Supreme Court, U.S.
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In The

Supreme Court of the United States

RUSSELL MEANS,

Petitioner,

vs.

NAVAJO NATION, a federally recognized Indian Tribe; and HONORABLE RAY GILMORE, Judge, Navajo Nation District Court, Chinle, Navajo Nation, Arizona,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can Congress lawfully vest Indian Nations, which are not subject to the United States Constitution, with criminal jurisdiction over nonmember Indians who are citizens of the United States — but not over nonmember non-Indians — without violating the equal protection and due process clauses of the Fifth Amendment to the United States Constitution? Can Indian tribes exercise criminal jurisdiction over nonmembers, but only as long as they are Indians, without violating the equal protection and due process provisions of the Indian Civil Rights Act, Title 25 U.S.C. § 1302(8)?

2. Can Indian tribes exercise criminal jurisdiction over nonmember Indians, who are citizens of the United States, outside of the United States Constitution without violating due process of law?

3. Did Congress, by amending the Indian Civil Rights Act to provide Indian tribes with criminal jurisdiction over nonmember Indians abrogate the Navajo Treaty of 1968, which explicitly provides for federal jurisdiction over intertribal offenses?

4. Does Congress possess the power to grant criminal jurisdiction to Indian Tribes over nonmembers under the Indian Commerce Clause, Art. 1, § 8, cl. 3, even though Tribes are not bound by the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioner, Russell Means and the Respondents, the Navajo Nation, a federally recognized Indian Tribe, and Honorable Ray Gilmore, Judge, Navajo Nation District Court, Chinle, Navajo Nation, Arizona, the United States intervened in this matter as a Defendant before the Court of Appeals for the Ninth Circuit.

Please also be informed that similar issues have been presented to this Court in the pending petition of *Morris v. Tanner,* No. 05-1285.

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PETITION FOR A WRIT OF CERTIORARI

Russell Means petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was first reported on August 23, 2005, but later amended by the Ninth Circuit after Mr. Means filed a petition for rehearing. The amended decision was filed by the Ninth Circuit on December 13, 2005 and is reported at 432 F.3d 924 (9th Cir. 2005). The Opinion filed on August 23, 2005 was withdrawn. Mr. Means then filed a subsequent petition for rehearing *en banc* which was denied by the Ninth Circuit on March 22, 2006. The judgment by the Ninth Circuit was entered on December 13, 2005. The final decision for the Court of Appeals for the Ninth Circuit is reproduced in the Appendix at App. 1.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on December 13, 2005. A timely petition for rehearing *en banc* was denied on March 22, 2006. The jurisdiction of the United States Supreme Court is invoked under Title 28 U.S.C. § 1254(1) and Rule 13(1)(3), Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment:* The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. V.

B. Title *25 U.S.C. § 1301:* For purpose of this title [25 U.S.C. §§ 1301, et seq.], the term –

> 1) "Indian Tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> 2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and **means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;**
>
> 3) "Indian court" means any Indian tribal court or court of Indian offense; and
>
> 4) "Indian" means any person **who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code,** if that person were to commit an offense listed in that section in Indian country to which that section applies.

Title 25 U.S.C. § 1301.[1] [Emphasis added].

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[1] The act of Congress specifically at issue is the amendment to Title 25 U.S.C. § 1301 embodied in the Act of November 5, 1990, §§ 8077(b)-(d), 104

(Continued on following page)

C. *Navajo Treaty of 1868:* 15 Stat. 668

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the Untied States, and also to reimburse the injured persons for the loss sustained.
>
> If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian; subject to the authority of the Untied States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws. . . .

Article I, Navajo Treaty of 1868, 15 Stat. 668, which is reproduced in the Appendix at App. 26-38.

STATEMENT OF THE CASE

Russell Means is a citizen of the United States. He is a member of the Oglala-Sioux tribe of Indians. He is a

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Stat. 1892-1893 (temporary legislation until September 30, 1991), as made permanent by the Act of October 28, 1991, 105 Stat. 646, which added the Congressional recognition and affirmation of a tribe's inherent power to prosecute "all Indians," in subsection (2), and added subsection (4). They are referred to herein as the 1990 Amendments.

permanent resident of Porcupine on the Pine Ridge Sioux Indian Reservation. Russell Means is not a member of nor is he eligible for membership in the Navajo Nation or Navajo Tribe of Indians. Membership within the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood, may not take place by adoption or custom, and does not exist for a person who is a member of another Indian Nation or Tribe. *See* Title 1 N.N.C. § 701-03.

On December 28, 1997, the Navajo Nation charged Russell Means with three offenses: (1) threatening Leon Grant, his father-in-law and a member of the Omaha tribe of Indians; (2) committing a battery upon Leon Grant, and (3) threatening Jeremiah Bitsue, a Navajo Indian. The three charges were filed against Mr. Means before the Chinle District Court, Navajo Nation. Mr. Means filed a motion to dismiss the charges due to constitutional violations and lack of jurisdiction. Judge Ray Gilmore held a hearing on the motions, and Mr. Means testified as the only witness. Based upon substantial ethnological research, Mr. Means testified that American Indians constitute a separate race. Mr. Means was married to Gloria Grant, a Navajo Indian and lived on the Navajo Indian Reservation from 1987 through most of 1997. Mr. Means moved from the reservation shortly before the incident involving Mr. Grant and Mr. Bitsue occurred.

As a nonmember Indian living on the Navajo Indian Reservation, Mr. Means could not start a business or obtain employment. He was treated the same as a non-Indian. As a nonmember, Mr. Means could not run for political office on the Navajo Nation, could not become a judge within the Navajo Nation, could not become a council delegate, etc. Mr. Means could not vote in tribal

elections. He could not participate in the democratic processes of the Navajo Nation.

Judge Gilmore denied the pretrial motions filed by Mr. Means. The Navajo Nation Supreme Court accepted jurisdiction to review the issue of jurisdiction and affirmatively decided that the Navajo Nation had criminal jurisdiction to prosecute Russell Means in a written decision issued on May 11, 1999. The Navajo Nation found that it had criminal jurisdiction over both nonmember Indians and non-Indians who reside on the Navajo Nation despite this Court's decisions in *Duro v. Reina,* 495 U.S. 676 (1990).

> The petitioner [Russell Means] belongs to the classification *hadane* [in-law] and not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos.

Means v. District Court, No. SC-CV-61-98, slip op. at p. 19 (Nav. Nat. S. Ct. 5/11/99).

Mr. Means initiated a Verified Petition for Writ of Habeas Corpus and/or for Writ of Prohibition with the United States District Court on June 15, 1999. Judge Carroll granted a preliminary injunction in favor of Mr. Means.

On September 20, 2001, Judge Carroll issued an order approving the Second Report and Recommendation of Magistrate Verkamp and denied Mr. Means' Petition. A judgment was issued denying the habeas petition. Mr. Means filed a timely notice of appeal on October 18, 2001.

The basis for federal jurisdiction in the *habeas corpus* proceeding filed by Mr. Means was based upon explicit

provisions of the Indian Civil Rights Act, Title 25 U.S.C. § 1303 and Title 28 U.S.C. § 2241(c)(1)(3).

The Court of Appeals for the Ninth Circuit found that the amendments to the Indians Civil Rights Act, expressly including "all Indians," really only "means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." *Means*, 432 F.3d 924, 930 (9th Cir. 2005). The Court then recognized that "Means' equal protection argument has real force," but concluded that it was "bound" to reject it because of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) (employment preference that favored Indians under Trust obligation of federal government allowed) and "under the doctrine of *Agostini v. Felton*," 521 U.S. 203, 237 (1997) (U.S. Supreme Court direct precedent applies even if it has been discredited by another line of cases from this Court). *Means*, 432 F.3d 924, 932. The Court then concluded that a mere "rational tie" standard under *Mancari* allowed discriminatory legislation against Indians. *Means*, 432 F.3d at 933. Besides, the Ninth Circuit noted, Indians are not entitled to equal protection under the U.S. Constitution because "Indian tribal identity is political rather than racial. . . ." *Id.* at 933.

The Ninth Circuit summarily rejected and virtually ignored the weighty "due process" arguments of Mr. Means, which was recognized by this Court in *United States v. Lara*, 541 U.S. 193 (2004), as well as, the fact that the Navajo Treaty of 1868 expressly provides for federal criminal jurisdiction over intertribal offenses.

ARGUMENTS AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. Indians Constitute An Ethnic Or Racial Class Entitled to Equal Protection of Law

In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the United States Supreme Court held that Indian tribal courts do not possess criminal jurisdiction over non-Indians. More than a decade later, the United States Supreme Court held that *Oliphant* and other authority "compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members." *Duro v. Reina,* 495 U.S. 676, 691 (1990).

Congress then amended the Indian Civil Rights Act (ICRA) ostensibly to provide that Indian tribal courts shall possess criminal jurisdiction over nonmember Indians, but not over nonmember non-Indians. *See* Title 25 U.S.C. § 1301(2) (1990). The grant of criminal authority over U.S. citizens to Indian governments without constitutional protection is an unlawful delegation of authority without adequate standards. It is not authorized under the "commerce" clause applicable to Indian tribes.

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert,* 354 U.S. 1 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States v. Mazurie,* 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish nonmembers in *tribal* court. We

> decline to produce such a result through recognition of inherent tribal sovereignty.
>
> Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent. This principle finds support in our cases as decided under provisions that pre-date the present federal jurisdictional statutes.

Duro v. Reina, 495 U.S. 676, 693-94 (1990).

In *United States v. Lara,* 541 U.S. 193 (2004), four Supreme Court Justices joined in the opinion by Justice Breyer, concluding that Congress has the power to "relax" historical and legal restrictions on tribal sovereign authority to try nonmember citizens of the United States as long as they are only "Indians." Justice Breyer expressly deduced that the power to prosecute nonmember Indians was an aspect of the tribes' "external relations and hence part of the sovereignty that was divested by treaties and by Congress" *Id.* Justice Breyer reaffirmed that *Duro v. Reina*, 495 U.S. 676 (1990), reviewed historic practices, including published opinions of the Department of the Interior, Indian treaties, views of experts, etc., which revealed that tribes did not historically possess the power to try nonmember Indians. "Congressional legislation constituted one such important source." *Lara*, 541 U.S. 193, 205-06. Justice Breyer concluded that the past position of Congress, however, "was subject to change." *Id.*

Justice Breyer forcefully and repeatedly stated that the Supreme Court did not consider "whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting nonmember citizens of the United States." *Id.* at 206. According to Justice Breyer, Mr. Lara's "double jeopardy" claim leaves other defendants facing tribal court proceedings free to raise issues of Equal Protection and Due Process of law. *Id.* at 206.

Justice Kennedy, concurring only in the judgment, found merit in both the Equal Protection and Due Process arguments against the lawful prosecution of Mr. Lara in tribal court as a nonmember Indian.

> Lara, after all is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the states. This is unprecedented. There is a historical exception for Indian tribes, but only to limited extent that a member of a tribe consents to being subjected to the jurisdiction of his own tribe.
>
> * * *
>
> The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens

> to the authority of an extraconstitutional sovereign to which they had not been previously subject.

Lara, 541 U.S. 193, 212 (2004). Justice Kennedy, the previous author of the *Duro* decision, noted that it would be pure "fiction" to contend that a nonmember Indian has somehow consented to the jurisdiction of other Indian tribes. *Lara*, 541 U.S. 193, 213.

Justice Thomas also concurred in the judgment of the Court, but expressly noted that Indian policy and federal Indian law is either confusing or schizophrenic. 541 U.S. 193, 218-19. Justice Thomas noted that the majority opinion by Justice Breyer contained an "inadequate constitutional analysis." *Id.* at 215-16. Justice Thomas interestingly noted that the Indian Commerce Clause, Art. 1, § 8, cl. 3, provided an inadequate legal basis for Congress to assert plenary power over all Indians and Indian tribes. According to Justice Thomas, it is impossible to simultaneously conclude that Indian tribes are sovereigns, yet also conclude that they are subject to plenary power and legislative displacement by Congress at will. Nevertheless, Justice Thomas concluded that Indian tribes did not historically possess criminal jurisdiction over nonmember Indians, which is consistent with the past views of both Congress and the executive branch, as well as, Indian treaties, statutes, Interior Department opinions, etc. *Lara*, 541 U.S. at 220-21. Justice Thomas noted that serious Constitutional issues remain. *Id.* at 222.

Of course, we also know that a new era of equal protection has largely been ignored or misconstrued by the Ninth Circuit. In *Adarand v. Pena*, 515 U.S. 200 (1995), the Supreme Court considered a bid on a federal construction project from a minority subcontractor. Justice

O'Connor expressly declared that a federal, racial classification must serve a compelling governmental interest and must be narrowly tailored to further the compelling governmental interest in order to survive equal protection scrutiny. 515 U.S. 200, 235. Justice O'Connor emphasized that the most exacting connection between the justification and the racial classification must be scrutinized, even if the Court was reviewing remedial race-based governmental action or otherwise benign classifications. The *Adarand* case clearly establishes that equal protection challenges under the Fifth Amendment and Fourteenth Amendment to the United States Constitution are analyzed precisely the same way, by applying strict scrutiny analysis.

Any argument that "Indians" can be defined in such a creative fashion to avoid the issue of race or ethnicity or nation origin in order to promote contemporary political objectives, should be laid to rest by considering two majority decisions authored by Justice Kennedy. Of course, we know that Justice Kennedy, writing for the majority in *Duro v. Reina,* expressly stated that the Supreme Court would decline to single out nonmember Indians for detrimental treatment. 485 U.S. 676, 692. In *Rice v. Cayetano,* 528 U.S. 495 (2000), Justice Kennedy focused upon statutes that accorded preferential treatment to native Hawaiians. To be sure, the state argued that no racial classification existed because Polynesian ancestors were excluded unless they resided in Hawaii in 1778 while, on the other hand, persons received voting rights if they could trace ancestry to Hawaii in 1778 even if they demonstrated only one sixty-fourth Hawaiian ancestry. Justice Kennedy quickly disposed of the argument that ancestry is

distinguishable from race. To the contrary, Justice Kennedy concluded that ancestry can be a proxy for race. Moreover, native Hawaiians have a common culture. 528 U.S. 495 at 518-20. It is simply impossible to find that the same conclusions do not apply to Indian members of each tribe. Yet, the Ninth Circuit ignored the *Cayetano* case.

Indians have always been recognized and classified according to their "race." *United States v. Rogers*, 45 U.S. 567 (1846). This Court recognized that Title 18 U.S.C. § 1153 (Major Crimes Act) only applies to Indians, "who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak to members of a tribe, but of the race generally . . . of the family of Indians." 45 U.S. at 572-73. *Also see United States v. Ives,* 504 F.2d 935, 953 (9th Cir. 1974) (Enrollment or lack of enrollment is not determinative as one's status of an Indian); *Ex Parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) (same); *United States v. Dodge,* 538 F.2d 770, 786 (8th Cir. 1976) (An individual must have some degree of Indian blood and must be recognized as an Indian). Congressional history behind the 1990 Amendment to the Indian Civil Rights Act also reveals the intent of Congress to make a racial, not a political distinction. *See* H. R. Conf. Rep. No. 101-938 pt. 2 (1990), 136 Cong. Rec. H. 13556, H. 13596 (Oct. 24, 1990).

Justice Kennedy focused directly upon Indian tribes in the *Cayetano* case. Justice Kennedy once again underscored the "preferential" treatment that must be accorded Indians under the *Mancari* case. 528 U.S. 495, at 518. Moreover, Justice Kennedy carefully noted that any preference to be accorded to Indians was confined to the authority of the BIA under the government's unique trust obligation. 528 U.S. 485, 520. Justice Kennedy expressly noted that Congress could not authorize schemes that

limit voting rights to a particular class of tribal Indians to the exclusion of all Indian citizens. *Also see Williams v. Babbit,* 115 F.3d 657 (9th Cir. 1997). Special treatment must be tied rationally to the trust obligation carried out by the BIA to Indians. Otherwise, *Mancari* does not apply. *Dawavendewa v. Salt River Project,* 154 F.3d 1117 (9th Cir. 1998). (An Indian tribe cannot discriminate against nonmember Indians through hiring preferences without violating Title VII); *Malabed v. North Slope Borough,* 42 F. Supp. 2d 927, 939 (Dist. Alaska 1999) (strict scrutiny applied to Native American employment preference); *Tafoya v. City Albuquerque*, 751 F. Supp. 1527, 1531 (Dist. N.M. 1990) (strict scrutiny); *Kornhass Construction, Inc. v. Oklahoma,* 140 F. Supp. 2d 1232, 1249 (W. Dist. Okla. 2001) (strict scrutiny for State bidding preference for Indians); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Pattern of Congruence, Diversions, and Judicial Deference,* 16 Ohio N.U.L. Rev. 591, 618 (1989); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples,* 38 U.C.L.A.L. Rev. 759, 761-62 (Apr. 1991); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes,* 101 Colum. L. Rev. 702, 709-17 (May 2001).

The three Judge panel from the Ninth Circuit avoided many of the critical issues in the case by over-simplifying them. First, the Court of Appeals noted that the Navajo Nation possessed a "need to exercise criminal jurisdiction" over nonmember Indians from the Reservation because of violence. Of course, far more non-Indians reside on Indian Reservations then the relatively small group of nonmember Indians. *See* American Indian Areas and Alaska Native Villages: 1980 census Populations, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census.

Second, the Court of Appeals for the Ninth Circuit shockingly took the position that Congress could discriminate against Indians as long as they categorized Indians as enrolled members of federally recognized tribes, rather than as ethnic Indians. In other words, the Ninth Circuit reasoned that treating enrolled Indians as a "political" group, as opposed to all ethnic Indians (enrolled and non-enrolled Indians), avoided any equal protection issue whatsoever. The analysis of the Ninth Circuit is a bit like saying that Congress could not discriminate against blacks, but could discriminate against all members of the NAACP because the latter is only a political group of citizens!

Unfortunately, the Ninth Circuit reached its conclusion without analyzing or even citing the lead case on equal protection from the United States Supreme Court, namely *Rice v. Cayetano,* 528 U.S. 495 (2000). This Court has ruled that any ethnic or cultural aspect of identity is a proxy for race!

While avoiding the *Rice v. Cayetano* case, the Ninth Circuit did recognize that it's expansive reading of *Morton v. Mancari,* 417 U.S. 535 (1974) was admittedly inconsistent with this Court's decision in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995). Nevertheless, the Ninth Circuit resolved the inconsistency by simply noting that it was bound to follow its' expansive reading of *Mancari* because it had direct application to the *Means* case even though it recognized that *Mancari* appears to have been rejected by the Supreme Court in another line of cases beginning with *Adarand.* The Ninth Circuit cited this Court's decision in *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Yet, *Morton v. Mancari* is logically limited to "preference legislation" by the BIA in favor of Indians, not

discriminatory legislation that subjects only nonmember Indians, rather then nonmember non-Indians, to the criminal jurisdiction of foreign Indian tribes.

The Court of Appeals for the Ninth Circuit, in other circumstances, has expressly found that discrimination against Indians, enrolled or ethnic, violates equal protection. The three Judge panel in this case crafted a different result in an apparent attempt to reach what it perceived as a politically correct decision. In *Western States Paving Co, INC. v. Washington State DOT,* 407 F.3d 983 (9th Cir. 2005), the Ninth Circuit concluded that Indians were a racial minority for federal contracting purposes. The Ninth Circuit then determined that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." It is inexplicable that the same standard did not apply when "all Indians" (Title 25 U.S.C. § 1301(2)) are subjected to the criminal jurisdiction of a foreign tribe outside of the federal Constitution. *Also see Malabed v. North Slope Borough,* 42 F. Supp. 2d 927, 939 (Dist. Alaska 1999) (strict scrutiny applied to Native American employment preference); *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1531 (Dist. N.M. 1990) (strict scrutiny); *Kornhass Construction, Inc. v. Oklahoma,* 140 F. Supp. 2d 1232, 1249 (W. Dist. Okla. 2001) (strict scrutiny for State bidding preference for Indians); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Pattern of Congruence, Diversions, and Judicial Deference,* 16 Ohio N.U.L. Rev. 591, 618 (1989) (equal protection article); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples,* 38 U.C.L.A.L. Rev.

759, 761-62 (Apr. 1991) (equal protection article); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes,* 101 Colum. L. Rev. 702, 709-17 (May 2001) (equal protection article).

II. Nonmember Indians Cannot Be Subject To The Jurisdiction of A Foreign, Domestic Tribe Without The Full Panoply Of The U.S. Constitution

Russell Means was never allowed to participate in the political processes of the Navajo Nation even though he was domiciled on the Navajo Nation as an Indian for a number of years. He was excluded because he held the blood of an Oglala Sioux rather than a Navajo Indian. Tribal courts have always been allowed to operate on a member-friendly basis because external jurisdiction has been historically and philosophically inconsistent with the status and practices of Indian tribal courts.

Justice Breyer, writing for the majority in the *Lara* case, noted that Lara's due process argument, if valid, "would show that any prosecution of a nonmember Indian under the statute is invalid." *Lara*, 541 U.S. at 434.

> Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. . . . Here, contrary to this design, the national government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the

> borders of the territorial borders of the Nation and one of the states. This is unprecedented.

Lara at 436. Justice Kennedy certainly framed the issue far differently than the panel decision in *Means*.

> The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress is attempting to do is subject American citizens to the authority of an extra constitutional sovereign to which they had not previously been subject. –

Lara at 437 (J. Kennedy, concurring in the judgment). Justice Kennedy also noted that the basic structure of the Constitution was in place before the Fifth and Fourteenth Amendments were adopted. "The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and as every bit as important as those freedoms guaranteed by the bill of rights . . . the individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores." *Id.*

The Ninth Circuit panel discussion ignored Mr. Means' argument predicated upon *Reid v. Covert*, 354 U.S. 1 (1957), and its progeny. In *Reid*, the Supreme Court reviewed the constitutionality of agreements with foreign governments requiring civilian dependents of military personnel to be tried by military tribunals. *Also see Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234 (1960). The Ninth Circuit did not cite nor acknowledge *Reid v. Covert*. Yet, *Reid* was cited favorably by this Court in *Duro*.

We contend that the power of Congress to regulate commerce among Indian tribes provides no greater authority than the power of Congress under Art. 1, § 8, cl. 14, to make rules for the government and to regulate the land and naval forces, the latter falling short of the mark needed by Congress to provide for military trial of civilian dependents accompanying armed forces in foreign countries. *Reid v. Covert, supra.* If military dependents could not be subjected to tribunals administrated by military justice, then surely Congress cannot subject nonmember Indian citizens to a trial by a foreign government that is not controlled by the United States Constitution.[2] It was noted by Justice Clark in *Kinsella*:

> We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible.

361 U.S. 234, 249.

III. The Navajo Treaty of 1868 Expressly Provides For Federal Jurisdiction Over Intertribal Offenses

The Navajo Treaty of 1868 provides for Navajo Nation jurisdiction over its own members but not over nonmembers. *Ex Parte Crow Dog,* 109 U.S. 556, 566-67 (1883). R.N. Clinton, *Development of Criminal Jurisdiction Over*

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[2] Only Indians, the ultimate minority in this country, could be subject to jurisdiction by a foreign power within the geographic limits of the United States, yet outside the protection of the United States Constitution.

Indian Lands: The Historical Perspective, Vol. 17 Ariz. L.R. 951, 959-60 and n.157 (1975), K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations,* 1980 Ariz. State L.J. 727, 738.

Congress did not purport to alter existing treaties when it amended the IRCA with the so-called "Duro fix." Congress did not even recognize the conflict, let alone choose "to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999). The panel decision from the Ninth Circuit reduces Indian treaties to nothing more than mild, yet irrelevant legal distractions.

Indians treaties do not explore "a grant of rights to the Indians, but a grant of rights from them," *United States v. Wirans,* 198 U.S. 371 (1905). A treaty cannot deprive a citizen of any right guaranteed by the U.S. Constitution. *Asakura v. Seattle,* 265 U.S. 332 (1929). Nor, of course can an act of Congress. Although treaty ambiguities must be resolved in favor of Indians (including Russell Means) the language and intent of treaties cannot be disregarded. *Babbitt v. Oglala Sioux Tribal Public Safety,* 194 F.3d 1374 (Fed. Cir. 1999). The Ninth Circuit creatively concluded that, while the Navajo Treaty of 1868 confers jurisdiction over intertribal offences to the United States, concurrent jurisdiction with the Navajo Tribe exists by silence! Yet, the entire purpose of removing tribal, criminal jurisdiction over U.S. citizens and nonmembers was to promote peace on the frontiers by limiting tribal authority.

The "plenary power" of Congress should not be extended to the point that any legislation is upheld either as consistent with Indian Treaties (by twisting their meaning

into alignment) or by automatically changing the meaning of treaties without little more than a hint that Congress expressly considered the conflict and resolved it properly. The record in this case does not allow the Navajo Treaty of 1868 to so easily fall.

IV. The Indian Commerce Clause Does Not Provide Congress With The Power to Bestow Criminal Jurisdiction On Indian Tribes Over Nonmembers

We suggest that the expansive interpretation of the Indian Commerce Clause beyond its true meaning is belied by the fact that the United States Supreme Court has repeatedly pulled in the reins on such expansive interpretation of the same clause referring to "commerce . . . among the several states." *See, e.g., United States v. Lopez,* 514 U.S. 549 (1995) (possession of a gun in local school zone was not economic activity that substantially affected interstate commerce; "commerce" is commercial intercourse). *Also see Spokane Tribe of Indians v. Washington,* 28 F.2d 991, 997 (9th Cir. 1994) (roughly equating interstate commerce and Indian commerce powers).

CONCLUSION

Fundamental issues of Indian law, fairness, and equal protection remain following this Court's decision in *United States v. Lara*, 541 U.S. 193 (2004), which should be resolved in the context of the *Means'* case. Indians should finally be recognized as a racial/ethnic minority and be entitled to equal protection of our laws.

Respectfully submitted,

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432 F.3d 924

Russell MEANS, Petitioner-Appellant,

v.

NAVAJO NATION, a federally recognized Indian Tribe; Ray Gilmore, Judge of the Judicial District of Chinle, Navajo Nation, Arizona; Robert Yazzie, Chief Justice of the Navajo Nation, Respondents-Appellees,

and

United States of America, Respondent-Intervenor-Appellee.

No. 01-17489.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 10, 2002.

Submission withdrawn Nov. 19, 2003.

Resubmitted Jan. 28, 2005.*

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* We withdrew submission of this case when the Supreme Court granted certiorari in *United States v. Lara*, 324 F.3d 635 (8th Cir.), *cert. granted*, 539 U.S. 987, 124 S.Ct. 46, 156 L.Ed.2d 704 (2003), *rev'd*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004), because *Lara* appeared likely to resolve many of the important and difficult issues presented in this case. *Lara* was decided April 19, 2004, but on June 10, 2004, the United States advised the court that because this case challenged the constitutionality of a federal statute, the United States was entitled to intervene. *See* 28 U.S.C. § 2403(a); Fed. R.App. P. 44. The United States filed a motion to intervene as of right on September 2, 2004. We granted the United States' motion, and the court subsequently received further briefing by the intervenor, the parties, and amicus curiae.

John Trebon, Trebon & Fine, P.C., Flagstaff, AZ, for the appellant.

Donovan D. Brown, Sr., Acting Deputy Assistant Attorney General, Navajo Nation Office of the Attorney General, Window Rock, AZ, for the appellees.

Thomas L. Sansonetti (briefed), Assistant Attorney General, U.S. Department of Justice, Env. & Nat. Resources Division, Washington, D.C., for the intervenor.

Jon Metropoulos (briefed), Gough, Shanahan, Johnson & Waterman, Helena, MT, for amicus curiae Thomas Lee Morris and Elizabeth S. Morris.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. No. CV-99-01057-EHC.

Before KLEINFELD, RAWLINSON, Circuit Judges, and QUACKENBUSH,** District Judge.

ORDER

The opinion filed August 23, 2005, and appearing at 420 F.3d 1037 (9th Cir.2005), is withdrawn. Pursuant to General Order 5.3.a, an opinion is filed contemporaneously with this order. With the withdrawal and substitution of the opinion, the petitions for rehearing and rehearing en banc are denied as moot. Subsequent petitions for rehearing and rehearing en banc may be filed. Federal Rule of Appellate Procedure 40 now controls.

** The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

OPINION

KLEINFELD, Circuit Judge.

This case concerns whether an Indian tribe can exercise criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe.

Facts

This is an appeal from a denial of a petition for a writ of habeas corpus. The petitioner, Russell Means, a member of the Oglala-Sioux Indian Tribe, seeks to prevent the Navajo Nation from criminally prosecuting him in Navajo tribal court for an incident that occurred on the Navajo Reservation.

In December 1997, Means allegedly threatened and battered his then father-in-law, who is an Omaha Indian, and allegedly threatened another man, a Navajo Indian. The offenses are misdemeanors under the Navajo Code, with potential maximum penalties of 90 days in jail and a $250 fine for each threat,[1] and 180 days in jail and a $500 fine for the battery.[2]

Means moved in the Navajo tribal court to dismiss the tribal proceedings. He argued that the tribal court had no jurisdiction over him because he was not a Navajo. Means testified that he is an enrolled member of the Oglala-Sioux Tribe of Indians, and a permanent resident of Porcupine, a town in South Dakota on the Pine Ridge Sioux Indian

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[1] *See* Navajo Nation Code tit. 17, § 310.

[2] *See* Navajo Nation Code tit. 17, § 316.

Reservation. Means lived on the Navajo Indian Reservation from 1987 to 1997 when he was married to a woman who was a half-Navajo, half-Omaha Indian. Means moved back to the Sioux reservation in 1997, and the alleged offenses occurred later when Means was visiting the Navajo reservation.

Means testified that the difference between an Oglala-Sioux and a Navajo is analogous to the difference in nationalities between an American and a French person. Although Means lived on the Navajo reservation for a decade while married to his ex-wife, he could never become a member of the Navajo tribe because membership required at least one quarter Navajo blood.[3] Means does not speak Navajo, and as a non-Navajo, he had difficulty obtaining employment because of tribal preferences given to Navajos and restrictions that make it difficult for a non-Navajo to find employment, participate in civic life, and license a business.

The Navajo Nation trial court denied Means' motion to dismiss for lack of jurisdiction. Means appealed to the Navajo Nation Supreme Court which also denied his motion. The decision of the Navajo Supreme Court explains that the Navajo reservation covers about 25,000 square miles, making it larger than many U.S. states and foreign countries.[4] Over 9,000 Indians of other tribes live

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[3] Enrolled membership in the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood. One may not become a Navajo by adoption or custom, and one cannot become a Navajo if he is an enrolled member of another Indian Nation or Tribe. *See* Navajo Nation Code tit. 1, §§ 701-703.

[4] The Navajo Reservation is almost three times the size of New Jersey.

within the Navajo Nation, so domestic violence cases involving non-Navajo Indians arise from time to time. The Navajo Supreme Court explained that the considerable amount of violence arising from alcohol, when combined with the size and ethnic inclusiveness of the reservation, generates a "need to exercise criminal jurisdiction over all who enter the Navajo Nation," not just Navajo Indians. The Navajo Supreme Court decision says that while there are preferences for Navajos in employment and contracting, they are not absolute barriers, and that Means could have qualified for jury service in the Navajo tribal courts had he been registered to vote in Arizona. The Navajo Supreme Court also noted that because Means had married a Navajo, he was a "hadane," or in-law during his residence on the reservation, connected by rights and obligations to his wife's clan. As the Navajo Supreme Court notes, however, becoming a "hadane" does not make one a Navajo.

After exhausting his remedies in the Navajo courts, Means petitioned the United States District Court for a writ of habeas corpus to enjoin the tribal courts from proceeding further in his case. The district court denied Means's petition, and he appeals.

Analysis

All the questions before us are purely matters of law, and arise on appeal of the district court's denial of a writ of habeas corpus under 25 U.S.C. § 1303, so we review de novo.[5]

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[5] *See McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir.2002); *Moore v. Nelson*, 270 F.3d 789, 790-92 (9th Cir.2001).

I. Jurisdiction

Means has exhausted his tribal court remedies regarding jurisdiction, but he has still not been tried for the alleged threats and battery. Nonetheless, Means remains subject to conditions of pretrial release. Means cannot have any contact with his former father-in-law or go within 100 yards of his former father-in-law's home. Means also must appear as ordered by the Navajo trial court or face re-arrest and additional punishment for any failure to appear. The district court therefore concluded that Means was in custody for purposes of habeas jurisdiction under *Justices of Boston Municipal Court v. Lydon*[6] and *Hensley v. Municipal Court.*[7] The parties have not challenged that conclusion before us, and, although we are required to examine jurisdiction *sua sponte*,[8] we agree with the district court. The charges against Means remain pending in the Navajo Nation trial court, and although the Navajo Nation and Means have stipulated to a stay in the trial court until this appeal is decided, the Navajo Nation states that it fully intends to prosecute Means if jurisdiction is resolved in its favor. Accordingly, we have jurisdiction to consider this appeal.

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[6] *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-02, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984).

[7] *Hensley v. Mun. Court, San Jose – Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 351-52, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973).

[8] *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir.2002).

II. The 1990 Amendments to the Indian Civil Rights Act

In *Oliphant v. Suquamish Indian Tribe,*[9] the Supreme Court held that Indian tribes do not possess criminal jurisdiction over non-Indians.[10] In *Oliphant,* the Suquamish Tribe had prosecuted two non-Indians, one for racing down a highway and colliding with a tribal police car, another for assaulting an officer and resisting arrest.[11] The tribe did not claim that Congress had given it authority to exercise jurisdiction, but rather that the tribe had an inherent sovereign authority to exercise criminal jurisdiction over incidents that occurred on its reservation – an authority that Congress had never taken away.[12] The Supreme Court disagreed and held that, although Indian tribes enjoy some sovereign powers, the "domestic, dependent"[13] nature of tribes distinguishes tribal governments from the governments of foreign countries.[14] It also held that citizens of the United States who are not Indians cannot be subjected to Indian tribal sovereignty for criminal purposes.[15]

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[9] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

[10] *Id.* at 194, 98 S.Ct. 1011.

[11] *Id.*

[12] *Id.* at 195-96, 98 S.Ct. 1011.

[13] *See Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831).

[14] *Oliphant,* 435 U.S. at 211, 98 S.Ct. 1011; *see United States v. Kagama,* 118 U.S. 375, 379, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

[15] *Oliphant,* 435 U.S. at 212, 98 S.Ct. 1011.

Following *Oliphant,* the Supreme Court suggested in *United States v. Wheeler*[16] that the inherent sovereignty of a tribe might extend only to its enrolled members.[17] Then, in *Duro v. Reina,*[18] the Court explicitly held that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[19] *Duro* reasoned that, as American citizens,[20] Indians were entitled not to be subjected to the criminal authority of sovereigns of which they were not and could not become full members.[21]

In 1990 Congress responded to Indian tribes' concerns about the holding in *Duro* by amending[22] the Indian Civil Rights Act[23] to say that the "powers of self-government" of Indian tribes "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[24] "All Indians" plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction. It is significant for the equal protection discussion below, however, that the

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[16] *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

[17] *Id.* at 323, 326-29, 98 S.Ct. 1079.

[18] *Duro v. Reina,* 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

[19] *Id.* at 679, 110 S.Ct. 2053.

[20] *See* Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b).

[21] *Duro,* 495 U.S. at 692-93, 110 S.Ct. 2053.

[22] *See* Pub.L. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990).

[23] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303.

[24] 25 U.S.C. § 1301(2).

1990 Amendments do not cover all persons who may be ethnically Indian. In addition to extending tribal criminal jurisdiction to "all" Indians, the 1990 Amendments make it plain that the definition of "Indian" is the same as "Indian" in the Major Crimes Act.[25]

The 1990 Amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[26] The statute referred to, 18 U.S.C. § 1153 (the Major Crimes Act), says it applies to "[a]ny Indian."[27] In *United States v. Antelope*,[28] enrolled Indians prosecuted under the Major Crimes Act argued that they were denied equal protection of the laws, because, had they not been Indians, they would have been prosecuted under more favorable state law. The Court described the federal scheme as one in which "[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." The Court rejected the Equal Protection challenge because "respondents were not subjected to federal criminal jurisdiction because they were of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe."[29] The Court pointed out that "federal jurisdiction under the Major Crimes Act does not

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[25] 18 U.S.C. § 1153.

[26] 25 U.S.C. § 1301(4).

[27] *See* 18 U.S.C. § 1153(a).

[28] *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).

[29] *Id.* At 646.

apply to many individuals who are racially to be classified as 'Indians.'"[30] The Court noted in dictum that lower courts had held that enrollment was not an "absolute" requirement for federal jurisdiction in some circumstances, but because respondents were enrolled, the Court was "not called upon to decide" whether enrollment was an absolute requirement and "therefore intimate[d] no views on the matter."[31]

Taken together, the 1990 Amendments, the Major Crimes Act, and *Antelope* mean that the criminal jurisdiction of tribes over "all Indians" recognized by the 1990 Amendments means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians. For that reason, subjecting Means to tribal court jurisdiction but not non-Indians, is, as we explain further below, not a racial classification.

Means argues that the 1990 Amendments were outside the powers of Congress because they were an unconstitutional delegation of federal governmental authority, and because they went beyond the congressional power authorized under the Indian Commerce[32] and Treaty[33] Clauses. Indian tribes are not bound by the United States Constitution in the exercise of their powers, including their judicial powers,[34]

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[30] *Id.* at 646 n. 7, 97 S.Ct. 1395 (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)).

[31] *Id.* at 646-47, n. 7, 97 S.Ct. 1395.

[32] U.S. Const. art. I, § 8, cl. 3.

[33] U.S. Const. art. II, § 2, cl. 2.

[34] *See Talton v. Mayes*, 163 U.S. 376, 382-85, 16 S.Ct. 986, 41 L.Ed. 196 (1896).

so federal judicial power over nonmembers could not be delegated to them.[35]

Following the 1990 Amendments, Means's theory was tested in other cases. Double jeopardy cases examined whether the statutory language, "recogniz[ing] and affirm[ing]" the power of tribes over nonmember Indians rather than "delegating" it, avoided double jeopardy problems when both a tribe and the federal government punished someone for the same conduct. If the tribe was exercising its inherent sovereign authority, an Indian defendant could be punished in both the tribal court as well as in federal district court under the "dual sovereignty" doctrine.[36] If the tribe was exercising delegated federal power, then the federal government would be punishing the Indian twice for the same conduct, which it could not do under the double jeopardy clause.[37] More broadly, after the Supreme Court in *Duro* had concluded that the tribe had not retained sovereign power over nonmember Indians,[38] the question was whether Congress even had the ability to "recognize" an inherent power.[39]

These questions raised by Means's statutory argument[40] have, subsequent to the original briefing in this

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[35] *See Duro*, 495 U.S. at 686, 110 S.Ct. 2053.

[36] *See, e.g., United States v. Lara*, 324 F.3d 635, 636 (8th Cir.2003) (en banc), *rev'd*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004); *United States v. Enas*, 255 F.3d 662, 675 (9th Cir.2001) (en banc).

[37] *See Enas*, 255 F.3d at 667.

[38] *See Duro*, 495 U.S. at 679, 110 S.Ct. 2053.

[39] *See Enas*, 255 F.3d at 667-75.

[40] *Cf. Enas*, 255 F.3d at 665; *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir.1998), *overruled in part, Enas*, 255 F.3d at 675 n. 8.

case, been definitively answered by the Supreme Court. *United States v. Lara*[41] holds that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do."[42] As for whether the tribe's exercise of criminal jurisdiction was a delegated power, or an inherent sovereign power, the Court held, with certain reservations, that "the Constitution permits tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."[43] Thus, except for the questions reserved in *Lara*,[44] it is settled law that, pursuant to the 1990 amendment to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe's reservation.

III. Equal Protection and Due Process

A. Equal Protection

Lara expressly declined to answer the question of whether the tribal criminal prosecution of a nonmember Indian would violate the Due Process and Equal Protection guarantees of the Fifth Amendment.[45] Means argues that by recognizing tribal criminal jurisdiction over nonmember Indians, the 1990 Amendments violate the

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[41] *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

[42] *Id.* at 200, 124 S.Ct. 1628.

[43] *Id.* at 210, 124 S.Ct. 1628.

[44] *See id.* at 207-09, 124 S.Ct. 1628 (declining to address equal protection and due process challenges to the Indian Civil Rights Act).

[45] *See id.* at 208-09, 124 S.Ct. 1628; *see also id.* at 213-14, 124 S.Ct. 1628 (Kennedy, J., concurring).

equal protection guarantees of the Fifth Amendment[46] and the Indian Civil Rights Act[47] because they discriminate against him as an Indian, subjecting him to adverse treatment on account of his race.

Means's equal protection argument has real force. He argues that although the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation.[48] This makes Means's case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[49] As an Oglala-Sioux, Means can never become a member of the

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[46] *See* U.S. Const. amend. V.

[47] *See* 25 U.S.C. § 1302(8).

[48] *See Oliphant*, 435 U.S. at 194, 98 S.Ct. 1011.

[49] *See Talton*, 163 U.S. at 382-85, 16 S.Ct. 986; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir.1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are imposed, they are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

Navajo political community, no matter how long he makes the Navajo reservation his home.

Despite the force of Means's argument, we nonetheless conclude that the weight of established law requires us to reject Means's equal protection claim. *Morton v. Mancari*[50] holds (albeit in the distinguishable context of Indian employment preferences by the federal government) that federal statutory recognition of Indian status is "political rather than racial in nature."[51] Means argues that *Mancari* is undermined by *Adarand Constructors, Inc. v. Pena*,[52] but both the Supreme Court and our court have continued to rely on *Mancari*,[53] and we are bound to follow it under the doctrine of *Agostini v. Felton*.[54]

Mancari held that an employment preference for Indians in the Bureau of Indian Affairs was not "invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment"[55] because "it is not even a

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[50] *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

[51] *Id.* at 553 n. 24, 94 S.Ct. 2474.

[52] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *see also Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1147-48, 160 L.Ed.2d 949 (2005).

[53] *See Rice v. Cayetano*, 528 U.S. 495, 518-22, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir.2004).

[54] *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

[55] *Mancari*, 417 U.S. at 551, 94 S.Ct. 2474.

'racial' preference."[56] "[L]egislation that singles out Indians for particular and special treatment" is in a special category because of the historical relationship of the United States with the Indians and the Indian Commerce Clause,[57] and "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[58] The preference at issue passed this "rational tie" standard, because it was "reasonable and rationally designed to further Indian self-government."[59]

We conclude that a law subjecting nonmember Indians to tribal criminal jurisdiction in "Indian country" passes the "rational tie" standard of *Mancari*. First, recognizing criminal jurisdiction of tribal courts over nonmember Indians furthers Indian self-government. The Navajo reservation, larger than many states and countries, has to be able to maintain order within its boundaries. The 1990 Amendments to the Indian Civil Rights Act were meant to protect Indians and others who reside in or visit Indian country, against lawlessness by nonmember Indians who might not otherwise be subject to any criminal jurisdiction. As the Navajo Supreme Court notes, there are a significant number of Indians who are not Navajos but live on the Navajo reservation because of intermarriage. It is a matter of ordinary experience that many people are not at their best when their marriages break up, so misdemeanor jurisdiction over nonmember Indians is rationally related to Indian self-government in an area

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[56] *Id.* at 553, 94 S.Ct. 2474.

[57] *See id.* at 551-55, 94 S.Ct. 2474.

[58] *Id.* at 555, 94 S.Ct. 2474.

[59] *Id.*

where rapid and effective tribal response may be needed. The Navajo Nation has a sophisticated body of published laws, and an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year. If Means was not subject to prosecution in the Navajo courts, he could not be prosecuted in any court. The state of Arizona, like the majority of states, does not have jurisdiction to try Indians for offenses committed on a reservation,[60] and there is no federal court jurisdiction because Means's alleged offenses do not fall within the Major Crimes Act.[61]

Second, the reason Congress can recognize the power of a tribe to exercise criminal jurisdiction over a nonmember Indian like Means – but not over a nonmember, non-Indian who like Means might become involved in a domestic dispute – is the same reason given by the Supreme Court for the employment preference in *Mancari*: Indian tribal identity is political rather than racial, and the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians.

In *United States v. Antelope,* Indians who were enrolled members of the Coeur d'Alene Tribe challenged the applicability of federal law to a prosecution for a murder that had taken place on the tribe's reservation.[62] Had they been of a different race, they argued, a more favorable provision of state law would have applied under the

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[60] *See, e.g., Application of Denetclaw,* 83 Ariz. 299, 320 P.2d 697, 698-701 (1958).

[61] *See* 18 U.S.C. § 1153.

[62] *Antelope,* 430 U.S. at 642-44, 97 S.Ct. 1395.

Assimilative Crimes Act,[63] rather than the less favorable federal provision that applied under the Major Crimes Act.[64] But the Supreme Court noted its holding in *Mancari* that the employment preference was granted to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities,"[65] and extended *Mancari*, even though the context did not involve Indian self-government. The Court found that the respondents were subjected to federal law "not because they are of the Indian race but because they are enrolled members of the Coeur d'Alene tribe."[66]

There is no sound distinction in principle between *Antelope* and this case. The statute subjects Means to Navajo criminal jurisdiction, not because of his race, but because of his political status as an enrolled member of a different Indian tribe.[67] We need not decide whether the same principle would apply if he had been expelled from or had voluntarily and formally withdrawn from his tribe,[68]

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[63] 18 U.S.C. § 13; *see United States v. McBratney*, 104 U.S. 621, 621-24, 26 L.Ed. 869 (1881).

[64] 18 U.S.C. § 1153.

[65] *Antelope*, 430 U.S. at 645, 97 S.Ct. 1395 (quoting *Mancari*, 417 U.S. at 554, 94 S.Ct. 2474).

[66] *Antelope*, 430 U.S. at 646, 97 S.Ct. 1395.

[67] 25 U.S.C. § 1301(2); *see Antelope*, 430 U.S. at 646, 97 S.Ct. 1395.

[68] The authorities suggest that members of Indian tribes can renounce their membership. *See Felix S. Cohen's Handbook of Federal Indian Law* 22 (1982 ed.) ("Tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. A member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses, although such termination will not lightly be inferred."); *see, e.g., Smith v. Bonifer*, 154 F. 883, 886 (C.C.D.Or.1907) (No. 2,683), *aff'd*, 166 F. 846 (9th Cir.1909); *United States ex rel. Standing Bear v.*

(Continued on following page)

prior to committing the alleged misdemeanors because those hypothetical facts are not claimed in this case. *Antelope* suggests that Indians "emancipated from tribal relations" or whose tribes have been terminated are not subject to the Major Crimes Act even if they are "racially to be classified as 'Indians.'"[69]

Our court is among the lower courts that have gone where the Supreme Court did not in *Antelope*, holding that formal enrollment in a tribe is not an "absolute" requirement for Indian status even though it is the "common evidentiary means of establishing Indian status."[70] *United States v. Bruce*[71] was a federal prosecution under 25 U.S.C. § 1152 (the Indian General Crimes Act) for assault on a child on an Indian reservation. The defendant in *Bruce* argued that she was an Indian, so she was entitled to the benefit of the exception in that statute for crimes committed by an Indian against an Indian. She was not enrolled in any tribe nor was she eligible for enrollment. We held (over a strong dissent) that she was nevertheless entitled to the benefit of the Indian exception because her mother's enrollment, two of her three children's enrollment, and other evidence of affiliation with the tribes demonstrated "'a sufficient non-racial link to a formerly sovereign people'"[72] to make her an "Indian" for purposes of the exception.

Crook, 25 F. Cas. 695, 699 (C.C.D.Neb.1879) (No. 14,891); *Thompson v. County of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y.1998).

[69] *Antelope*, 430 U.S. at 646-47, n. 7, 97 S.Ct. 1395.

[70] *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir.2005).

[71] *Id.*

[72] *Id.* at 1224 (quoting *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D.1988)).

Means's case is distinguishable from *Bruce*, most especially by his tribal enrollment. We therefore can and do leave for another day the challenging question *Bruce* invites: whether a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe, would be subject to tribal court jurisdiction. While *Bruce* was a federal prosecution which would have implicitly limited tribal sovereignty if the Indian exception did not apply, this case is a tribal court prosecution. Means has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial. *Bruce* concluded, as we do, that "Tribal courts may . . . prosecute misdemeanors against Indians who are not members of that tribe."[73]

B. Due Process

Because the criminal proceedings against Means in the Navajo trial court have been stayed pending the outcome of his jurisdictional challenge, an "as applied" due process challenge to the Navajo trial proceedings would be premature.[74] Means's facial due process challenge to the 1990 Amendments has no force. Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers,[75] the Indian Civil Rights Act confers all the criminal protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed

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[73] *Id.* at 1220.

[74] *See Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

[75] *See Talton*, 163 U.S. at 382-85, 16 S.Ct. 986.

counsel if he cannot afford an attorney.[76] The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor.[77] The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction.[78] Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

IV. The Treaty of 1868

The war between the United States and the Navajo Nation, which began in the middle of the U.S. Civil War, ended in 1868 with a treaty,[79] signed on behalf of the United States by General William Tecumseh Sherman. Means argues that under the terms of this treaty, he may not be criminally prosecuted by the Navajo tribe, but must be turned over to the federal government for trial.

Means bases his argument on the so-called "bad men" clauses of the 1868 Treaty. Indian tribes warred, not only with the federal government, but also with other tribes. Guaranteeing that the Indians would return to a peaceful way of life, therefore, required some means of dealing with the hostile foreign tribes.

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[76] *See* 25 U.S.C. § 1302; *Santa Clara Pueblo,* 436 U.S. at 61, 98 S.Ct. 1670; *Randall v. Yakima Nation Tribal Court,* 841 F.2d 897, 899-900 (9th Cir.1988).

[77] *See* U.S. Const. amend. V; *cf.* Fed. R.Crim.P. 7(a)(2).

[78] *See* Navajo Nation Code tit. 1.

[79] Treaty between the United States of America and the Navajo Tribe of Indians, June 1, 1868, U.S.-Navajo, 15 Stat. 667.

One clause in the 1868 Navajo Treaty – which is identical to language used in a number of Indian Treaties of the time – says that

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States.[80]

A second clause, speaking expressly about Indians, is analogous:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws.[81]

Means argues that even if the Navajo Nation at one time possessed the sovereign power to assert criminal jurisdiction over nonmember Indians, it relinquished that right by entering into the 1868 Treaty, which requires that the Navajo Tribe deliver the wrongdoer to the United States, to be tried and punished according to federal, not Indian, law. Means also argues that the 1990 Amendments to the

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[80] *Id.*

[81] *Id.*

Indian Civil Rights Act cannot abrogate the protections to which he is entitled under the 1868 Treaty because Congress has never expressly abrogated the treaty.

The Navajo Nation, however, argues that a discussion between General Sherman and the Navajo Chief Barboncito during the treaty negotiations expresses an understanding that the Navajo were entitled to "drive out" raiders from the Ute and Apache tribes who might molest them, and that the Indian "bad men" clause therefore meant to confer jurisdiction over nonmember Indians, not to remove it. The Navajo Nation also suggests that we are bound to defer to the understanding of the treaty expressed well over a century after its adoption by the Navajo Nation Supreme Court. That court found that the 1868 Treaty provides for criminal jurisdiction over Means because he entered the Navajo Nation, married a Navajo woman, and engaged in business and civic activities while residing on the reservation.

We accept neither argument because the 1868 Treaty does not conflict with, and is easily reconciled with, the language of the 1990 Amendments to the Indian Civil Rights Act that recognizes the inherent sovereign power of the tribe. A common sense understanding of the treaty language would be that the United States was obligating itself to protect the Navajos from "bad men," of whom the world is never short, and the Navajos were obligating themselves to turn the "bad men" over to the United States when appropriate under the specified conditions.[82] The treaty obligates the United States to arrest and

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[82] *Cf. Tsosie v. United States,* 825 F.2d 393, 400-02 (Fed.Cir.1987); *Hebah v. United States,* 192 Ct.Cl. 785, 428 F.2d 1334, 1338-40 (1970).

punish offenders against the Navajo, under federal law, but it does not say that the Navajo cannot do so on their own, and there is nothing in the treaty language inconsistent with the concurrent jurisdiction that we have recognized in other contexts.[83]

The remedies provided for by the 1868 treaty do not purport to be exclusive. Under the treaty, Indian offenders are to be delivered to the United States for prosecution under federal law on request. This provision, however, is conditioned on a request from the United States's agent. The treaty conditions have not been fulfilled in this case, so the rendition provision in the treaty does not apply. The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do.

Conclusion

The Navajo Nation is empowered, under the 1990 Amendments, to prosecute and punish Indians for crimes even though they are not members of the tribe. The denial of Means's petition for a writ of habeas corpus is

AFFIRMED.

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[83] *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 595-98 (9th Cir.1983); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685-86 (9th Cir.1969); *see also Williams v. Lee*, 358 U.S. 217, 221-22, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS, Petitioner-Appellant, v. NAVAJO NATION, a federally recognized Indian Tribe; et al., Respondents-Appellees.	No. 01-17489 D.C. No. CV-99-01057-EHC **JUDGMENT**

Appeal from the United States District Court for the District of Arizona (Phoenix).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Tuesday, December 13, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS,
Petitioner-Appellant,
v.
NAVAJO NATION, a federally recognized Indian Tribe; et al.,
Respondents-Appellees.

No. 01-17489
D.C. No. CV-99-01057-EHC
District of Arizona, Phoenix
ORDER
(Filed Mar. 22, 2006)

Before: KLEINFELD and RAWLINSON, Circuit Judges, and QUACKENBUSH,* District Judge.

Judges Kleinfeld and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Quackenbush has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en bane is DENIED.

* The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

CONCLUDED JUNE 1, 1868.
RATIFICATION ADVISED JULY 25, 1868.
PROCLAIMED AUGUST 12, 1868.

U.S. TREATY WITH THE NAVAJOS, 1868

ANDREW JOHNSON, President of the United States of America, to all and singular to whom these presents shall come, greetings:

Whereas a Treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant General W.T. Sherman and Samuel F. Tappan, Commissioners, on the part of the United States, and Barboncito, Armijo, and other Chiefs and Headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which Treaty is in the words and figures following, to wit:

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant General W.T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed), of the other part, witness:

ARTICLE 1.

From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or

the laws of the United States, shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through Old Fort Lyon or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109 degree 30' west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in the article.

ARTICLE III.

The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and

blacksmith-shop, not to ~~cost exceeding~~ one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV.

The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V.

If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long a she or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eight acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspect, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settle on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled

to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII.

When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitle to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian – each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate

properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate for year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs, in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX.

In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large

game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2d. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home or traveling nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X.

No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him provided in article 5 of this treaty.

ARTICLE XI.

The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII.

It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander or the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induced Indians now away from reservation set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W.T. Sherman,
Lt. Gen'l, Indian Peace Commissioner.

S.F. Tappan,
Indian Peace Commissioner.

Barboncito, Chief
Armijo Delgado Manuelito Largo
Herrero Chiqueto
Muerto de Hombre
Hombro Narbono
Narbono Segundo
Ganado Mucho

Council

Riquo
Juan Martin
Serginto
Grande
Inoetenito
Muchachos Mucho
Chiqueto Segundo
Cabello Amarillo
Francisco
Torivio
Desdendado
Juan
Guero
Gugadore
Cabason
Barbon Segundo
Cabare Colorados

ATTEST:

Geo. W.G. Getty,
Col. 37th Inf'y, Bt. Maj. Gen'l U.S.A.

B.S. Roberts,
Bt. Brg. Gen'l U.S.A., Lt. Col. 3rd Cav'y

J. Cooper McKee,
Bt. Lt. Col. Surgeon U.S.A.

Theo. H. Dodd,
U. S. Indian Ag't for Navajos.

Chas. McClure,
Bt. Maj. and C. S. U.S.A.

James F. Weeds,
Bt. Maj. and Asst. Surg. U.S.A.

J.C. Sutherland, Interpreter
William Vaux, Chaplain U.S.A.

And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

In Executive Session, Senate of the United States, July 25, 1868

Resolved, (two-thirds of the senators present concurring) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:
Geo. C. Gorham, Secretary.
By W.J. McDonald, Chief Clerk.

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America, the ninety-third.

(Signature)

By the President:

W. Hunter
Acting Secretary of State.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 05-1614

In the Supreme Court of the United States

RUSSELL MEANS, PETITIONER

v.

NAVAJO NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
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QUESTIONS PRESENTED

The Indian Civil Rights Act of 1968, 25 U.S.C. 1301, 1302, restores to Indian Tribes their inherent power to try misdemeanor criminal offenses committed by non-member Indians in Indian country. The questions presented are:

1. Whether those provisions of the Indian Civil Rights Act of 1968 violate equal protection.

2. Whether those provisions of the Indian Civil Rights Act of 1968 violate due process.

3. Whether the assertion of Tribal jurisdiction in this case violates the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.

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In the Supreme Court of the United States

No. 05-1614

RUSSELL MEANS, PETITIONER

v.

NAVAJO NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 432 F.3d 924. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on December 13, 2005. A petition for rehearing was denied on March 22, 2006 (Pet. App. 25). The petition for a writ of certiorari was filed on June 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Criminal jurisdiction over offenses committed in Indian country is governed by a complex patchwork of federal, state, and tribal law." *Negonsott* v. *Samuels*,

507 U.S. 99, 102 (1993) (internal quotation marks and citations omitted). The United States may prosecute federal crimes of nationwide applicability to the same extent in Indian country as elsewhere. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that, with certain specified exceptions, federal criminal laws that apply in enclaves under exclusive federal jurisdiction also apply within Indian country. One exception is that offenses committed by one Indian against the person or property of another Indian are not subject to prosecution under Section 1152. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. *Negonsott*, 507 U.S. at 103. States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. *United States* v. *McBratney*, 104 U.S. 621 (1881). In addition, Congress has granted a number of States authority to exercise general jurisdiction over crimes committed by or against Indians in Indian country. See, *e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1162).

Indian Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Tribes have inherent sovereign power to prosecute their own members for violations of tribal law. *Id.* at 326. By virtue of their dependant status, however, Tribes have been divested of their inherent power to prosecute non-Indians.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-212 (1978).

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, imposes a number of limitations on Tribes that are analogous to those that the Constitution imposes on the United States and the States. For example, ICRA extends due process and equal protection rights that parallel those arising under the Constitution. 25 U.S.C. 1302(8). ICRA also affords a habeas corpus remedy in federal court. 25 U.S.C. 1303. Tribal courts have jurisdiction only over misdemeanor offenses, and are limited by ICRA to imposing punishments of up to one year in prison and a fine of $5000. 25 U.S.C. 1302(7).

For many years, tribal courts exercised criminal jurisdiction over nonmember Indians. In *Duro* v. *Reina*, 495 U.S. 676, 686-687 (1990), however, the Court held that the Tribes' dependent status had divested them of that authority. *Duro* created a potentially significant jurisdictional gap in law enforcement in Indian country. After *Duro*, unless an offense committed by a nonmember Indian against an Indian fell within the Indian Major Crimes Act or a federal law of general applicability, the United States, States, and Tribes all lacked authority to prosecute it. That presented a significant problem because many reservations have a large population of nonmember Indians.

In response to *Duro*, Congress enacted legislation that reaffirmed inherent tribal jurisdiction over nonmember Indians, thereby closing the jurisdictional gap that *Duro* had created. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (25 U.S.C. 1301(2)). The legislation amended ICRA's definition of a Tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed,

to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). ICRA defines "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" under 18 U.S.C. 1153. 25 U.S.C. 1301(4).

The initial legislation was effective until September 30, 1991. § 8077(d), 104 Stat. 1893. After the legislation was enacted, Congress conducted "extensive hearings." S. Rep. No. 153, 102d Cong., 1st Sess. 12-13 (1991). As a result of those hearings, Congress made the legislation permanent. Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646. Congress decided that permanent legislation was appropriate because nonmember Indians "own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," receive many tribal services, and have other close ties to Tribes. S. Rep. No. 153, *supra*, at 7. Congress also relied on the fact that "[u]ntil the Supreme Court ruled in the case of *Duro*, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years." S. Rep. No. 168, 102d Cong., 1st Sess. 2 (1991).

In *United States* v. *Lara*, 541 U.S. 193, 200 (2004), the Court held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." The Court did not decide whether tribal jurisdiction over nonmember Indians violates equal protection or due process. *Id.* at 208-209.

2. Petitioner is an enrolled member of the Oglala-Sioux Indian Tribe. Pet. App. 3. Petitioner lived on the Navajo Reservation from 1987 to 1997. *Id.* at 4. During that period, petitioner was married to a woman who was an enrolled member of the Navajo Nation. *Ibid.* In De-

cember 1997, while on Navajo reservation lands, petitioner allegedly threatened and battered his father-in-law, who is an Omaha Indian, and threatened another man, who is a Navajo Indian. *Id.* at 3. Petitioner was prosecuted in Navajo tribal court for those alleged offenses. *Ibid.*

Petitioner moved to dismiss the proceedings, asserting that the court lacked jurisdiction over him because he was not a Navajo Indian. Pet. App. 3. After the trial court denied the motion, petitioner appealed to the Navajo Supreme Court. *Id.* at 4. The Navajo Supreme Court denied relief. *Means* v. *District Court of the Chinle Judicial Dist.*, No. SC-CV-61-98 (May 11, 1999); C.A.E.R. 6. Petitioner then filed a petition for habeas corpus in the United States District Court for the District of Arizona, asserting that the tribal court lacked jurisdiction to prosecute him. Pet. App. 2. The district court denied the petition. *Means* v. *Navajo Nation*, No. 99-1057 (Sept. 20, 2001); C.A.E.R. 19.

3. The court of appeals affirmed. Pet. App. 1-24. The court first rejected petitioner's contention that the ICRA Amendments create an impermissible racial classification. *Id.* at 12-19. The court held that when the ICRA amendments state that they apply to "all Indians," that means "all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians." *Id.* at 10. The court noted that under *Morton* v. *Mancari*, 417 U.S. 535 (1974), such a distinction is political rather than racial and does not violate equal protection provided that it can be tied rationally to the fulfillment of Congress's unique obligations toward Indians. Pet. App. 14-15. The court held that the ICRA amendments satisfy that standard because they further

the Tribes' ability to maintain order within their reservation boundaries. *Id.* at 15-16.

The court also relied on the holding in *United States* v. *Antelope*, 430 U.S. 641 (1977), that the application of the Indian Major Crimes Act to tribal members is constitutional even when it results in less favorable treatment than that accorded to persons prosecuted under the Assimilative Crimes Statute, 18 U.S.C. 13, because the Indian Major Crimes Act applies to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities." Pet. App. 17 (quoting *Mancari*, 419 U.S. at 554). The court perceived "no sound distinction in principle between *Antelope* and this case." *Ibid.* The court added that petitioner had the option to renounce tribal membership and thereby avoid tribal jurisdiction. *Id.* at 17-18.

The court of appeals held that petitioner's as-applied due process challenge was premature because his prosecution had been stayed. Pet. App. 19. The court also held that the ICRA amendments are not facially invalid under the Due Process Clause. *Id.* at 19-20. The court observed that (1) ICRA affords all criminal protections conferred by the Constitution except for the right to grand jury indictment and the right to appointed counsel, (2) the right to grand jury indictment does not apply to misdemeanors, and (3) the right to appointed counsel is conferred by the Navajo Bill of Rights. *Ibid.*

The court also rejected petitioner's contention that the Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, barred his prosecution. Pet. App. 20-23. In making that contention, petitioner relied on a clause in the Treaty that provides that "[i]f bad men among the Indians shall commit a wrong * * * upon the person or property of any one, * * * subject to the authority of the

United States," the Navajo Nation "will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws." *Id.* at 21. The court of appeals held that the Treaty obligates the Navajo Nation to turn over an Indian wrongdoer when the United States makes that request, but it does not deprive the Tribe of authority to prosecute an Indian wrongdoer when there has been no such request. *Id.* at 22-23.

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the amendments to the Indian Civil Rights Act of 1968 (ICRA) violate equal protection because they subject Indians to tribal jurisdiction on the basis of race. That contention is without merit and does not warrant review.

This Court has consistently rejected equal protection challenges to Acts of Congress that treat tribally-affiliated Indians differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The Court has explained that such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646-647.

The Constitution expressly identifies "Indian Tribes" as distinct entities, Art. I, § 8, Cl. 3, and this Court has consistently held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes." *United States* v. *Lara*, 541 U.S. 193, 200 (2004). Furthermore, in contrast to "immutable characteristic[s]" such as race, sex, and national origin

that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is voluntary, and it may be relinquished at any time. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990). Accordingly, the Court has held that laws that treat tribally-affiliated Indians differently from others withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Section 1301(2), as amended after *Duro*, regulates the relationship among Tribes and the individual Indians affiliated with those Tribes. Just as Congress may define the attributes of Indians' membership in their own Tribe to include entitlement to services provided by another Tribe on whose reservation they reside, see 25 U.S.C. 450j(h); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120-1124 (9th Cir. 1998), cert. denied, 528 U.S. 1098 (2000), Congress may define the attributes of Indians' tribal affiliation to include submission to the criminal jurisdiction of any other Tribe whose laws they violate. Indeed, Congress has long excepted "crimes committed by one Indian against the person or property of another Indian" from the scope of general federal criminal jurisdiction in Indian country, see Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; 18 U.S.C. 1152, choosing to leave Indians "as regard[s] their own tribe, *and other tribes also*, to be governed by Indian usages and customs." *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (emphasis added).

Petitioner contends (Pet. 14) that the ICRA amendments create a racial classification rather than a political classification because Indian status is a "proxy for race."

That contention is incorrect. The ICRA amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18." 25 U.S.C. 1301(4). In *Antelope*, the Court held that the term "Indian" in Section 1153 creates a political classification rather than a racial classification. 430 U.S. at 645-647. The Court explained that the term "Indian" in Section 1153 does not refer to all persons who are racially Indians, but to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. *Id.* at 646 & n.7. The Court further explained that the criminal defendants in that case "were not subjected to federal criminal jurisdiction because they [were] of the Indian race but because they [were] enrolled members of the Coeur d'Alene Tribe." *Id.* at 646.

Because the ICRA amendments incorporate the definition of Indian in 18 U.S.C. 1153, the analysis in *Antelope* is controlling here. Like Section 1153, the ICRA amendments do not apply to all persons who are racially Indians, but only to enrolled members of Indian Tribes and possibly to some non-enrolled Indians who live on the reservation and maintain tribal relations. Furthermore, petitioner is not subject to tribal jurisdiction because of his race, but because he is an enrolled member of the Oglala-Sioux Tribe. See Pet. App. 3.

The direct relationship between Section 1301(4) and 18 U.S.C. 1153 is not a matter of mere definitional convenience. Section 1301(4) forms an essential component of the comprehensive jurisdictional regime in Indian country, and thereby closes the jurisdictional gap created by *Duro*. Under that regime, as restored by ICRA, specified major crimes committed by one tribally-affili-

ated Indian against another in Indian country are subject to federal prosecution under Section 1153, while more minor crimes are subject to prosecution by the Tribe on whose reservation the crime was committed. The power of Congress, recognized in *Antelope*, to provide protection for Indians by ensuring that violators are subject to prosecution, applies equally to the provision for federal prosecution under 18 U.S.C. 1153 and the provision for tribal prosecution under 25 U.S.C. 1301(4).

Petitioner's reliance (Pet. 14) on *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), is misplaced. In *Adarand*, the Court held that all racial distinctions are subject to strict scrutiny. *Id.* at 227. Because the ICRA amendments create a political classification rather than a racial classification, *Adarand* is inapposite. Nor does the decision in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), assist petitioner. In that case, the Court held that the State of Hawaii violated the Fifteenth Amendment when it limited the right to vote in a state-wide election to persons of Hawaiian ancestry. The Court found that while the classification was framed in terms of Hawaiian ancestry, the State had an express racial purpose in enacting the limitation and the actual effects of the classification were racial as well. *Id.* at 516-517. In this case, by contrast, the classification was enacted by Congress, rather than a State; it concerns tribal jurisdiction, not eligibility to vote in a state or federal election; and, most important, as the controlling decision in *Antelope* makes clear, it has both a political purpose and a political effect. *Rice* therefore has no application here.

Because the classification at issue here is political, the sole equal protection question is whether the ICRA amendments are rationally tied to the fulfillment of Con-

gress's obligations toward Indians. See *Mancari*, 417 U.S. at 555. The ICRA amendments satisfy that standard in two ways. First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 391 (citation omitted), by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes who voluntarily enter its territory. A Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, * * * frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, *supra*, at 6-7.

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by nonmember Indians. See *Duro*, 495 U.S. at 696. Because the United States and the States often lack jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by nonmember Indians. S. Rep. No. 168, *supra*, at 4. And even aside from questions of jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by nonmember Indians. Accordingly, the ICRA amendments are rationally related to the legitimate goals of advancing tribal self-government and protecting the safety of the reservation community, and they do not violate the Constitution's equal protection guarantee.

2. Petitioner's due process claim (Pet. 16-18) is equally without merit. ICRA guarantees protections to criminal defendants in tribal court that are analogous to the protections that the Constitution guarantees criminal defendants in federal and state courts. See 25 U.S.C. 1302. Among other protections, criminal defendants in tribal court are entitled to a speedy and public trial; they must be informed of the nature of the charges against them; they have a right to confront the witnesses against them; they have a right to compulsory process to obtain witnesses on their behalf; they have the right, at their own expense, to the assistance of counsel; and they have the right to a trial by jury for any offense punishable by imprisonment. 25 U.S.C. 1302(6) and (10). Criminal defendants also have a right to seek federal habeas corpus review to challenge detentions that are ordered by an Indian Tribe. 25 U.S.C. 1303.

ICRA does not expressly provide a right to appointed counsel for persons who cannot afford an attorney. But the Navajo Bill of Rights provides a right to appointed counsel. Pet. App. 19-20. In addition, while ICRA does not guarantee the right to an indictment by a grand jury for infamous crimes, that right is not implicated by petitioner's offenses. *Ibid.* The Navajo Nation also permits nonmembers to serve on juries. *Id.* at 5.

Petitioner contends (Pet. 18) that Congress lacks power to "subject nonmember Indian citizens to a trial by a foreign government that is not controlled by the United States Constitution." But in any proceeding in the courts of the Navajo Nation, petitioner is entitled to the same protections that the Constitution affords to citizens in a United States court. Indeed, petitioner has not identified any specific protection that would be lacking were he to be tried in the courts of the Navajo Na-

tion. Moreover, ICRA also provides a procedural mechanism for vindicating those protections, a federal habeas corpus remedy. See 25 U.S.C. 1303. Petitioner's due process claim is therefore without merit.

3. Petitioner argues (Pet. 18-19) that the Treaty with the Navajo Indians (Treaty), June 1, 1868, 15 Stat. 667, bars the Navajo Nation from exercising jurisdiction over non-member Indians. The text of the Treaty, however, provides no support for that contention. The Treaty provides, in relevant part, that "[i]f bad men among the Indians shall commit a wrong * * * upon the person or property of any one, * * * subject to the authority of the United States," the Navajo Nation "will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws." Pet. App. 21. As the court of appeals explained, that language in the Treaty requires the Navajo Nation to turn over an Indian wrongdoer when the United States initiates a process to secure that wrongdoer, but it has no effect on tribal jurisdiction to try a wrongdoer when the United States has not initiated such a process. *Id.* at 22-23. Because the United States has not initiated a process to secure petitioner for a trial under United States laws, the Treaty is inapplicable here.

4. Finally, petitioner contends (Pet. 20) that the ICRA amendments exceed Congress's powers under the Indian Commerce Clause. That argument is foreclosed by this Court's decision in *Lara*. In that case, the Court expressly held that Congress "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians." 541 U.S. at 200.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 05-1614

In The Supreme Court of the United States

RUSSELL MEANS,

Petitioner,

v.

NAVAJO NATION, a federally recognized Indian Tribe; RAY GILMORE, Judge of the Judicial District of Chinle, Navajo Nation, Arizona; ROBERT YAZZIE, Chief Justice of the Navajo Nation

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents restate the issues before this Court as follows:

1. Whether the Navajo Nation, exercising its inherent right to prosecute a nonmember Indian, as recognized and affirmed by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, provides appropriate procedural protections consistent with or greater than those required of the ICRA.

2. Whether the Navajo Nation, exercising its inherent right to prosecute a nonmember Indian, as recognized and affirmed by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, without violating the Navajo Treaty of 1868, 15 Stat. 667 and without violating the equal protection provisions of the United States Constitution.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY PETITION

This Court has previously affirmed Congress' broad constitutional plenary power to impose "benefits" and "burdens" on federally recognized Indian Tribes and their members. Recently the "plenary power" doctrine upheld Congress' constitutional authority to remove implied restrictions prohibiting federally recognized Indian Tribes from exercising inherent criminal jurisdiction over non-members Indians. Consequently, current federal law and federal policy support the Navajo Nation's prosecution of Petitioner. The Ninth Circuit Court of Appeals also properly concluded that the Navajo Treaty of 1868, Art. 1, 15 Stat. 667, and the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, are reconcilable and affirm, rather than prohibit the Navajo Nation's prosecution of Petitioner. This decision is consistent with existing federal policy given the unique political government-to-government relationship and trust responsibilities of the United States to the Navajo Nation. In addition, the Ninth Circuit Court of Appeals decision was correct that the Navajo Nation courts, "as a facial matter", provide Petitioner appropriate procedural protections consistent with those required of the Constitution. Consequently, the Navajo Nation provides procedural protections greater than those required by the ICRA. The Court should therefore deny the Petition because it does not qualify or otherwise merit review by this Court.

STATEMENT OF CASE AND FACTS

Respondents incorporate the discussion of the facts in the opinion of the Ninth Circuit Court of Appeals (*Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005)) and the discussion of the facts in the opinion of the Supreme Court of the Navajo Nation (*Means v. District Court of the Chinle Judicial District*, 2 Nav. App. R. 528, 26 I.L.R. 6083 (1999)).

ARGUMENT

Like smallpox blankets, the Court's judgments create an immediate debilitating impact, confusion in Indian Country for tribal governments and their neighboring governments. The governmental neighbors who often work together on common concerns find that governance is now unnecessarily complex for tribes especially, governmental planning and economic development have become more problematic. An ordinary exigency, such as an accident somewhere in Indian Country, with an immediate need for emergency medical services, fire services, and possibly the need to arrest an offender, raises questions about which government has the authority to respond. The cumulative decisions of the Court do not engender optimism about the future of tribal jurisdiction when the cases eviscerate, albeit incrementally, the authority of the fist sovereigns within the borders of the United States. [Footnote omitted] Like the toxic blankets, the cases contain unacknowledged elements that in their maximum force could destroy the tribes as

culturally, distinct nations governing their own lands.[1]

I. THE CONGRESS HAS BROAD CONSTITUTIONAL PLENARY POWER OVER INDIAN AFFAIRS AND IS EMPOWERED TO LEGISLATIVELY RECOGNIZE AND AFFIRM THE LONGSTANDING INHERENT CRIMINAL JURISDICTION OF FEDERALLY RECOGNIZED INDIAN TRIBES OVER NONMEMBER INDIANS

The Petitioner argues that the Congress lacks sufficient authority to impose ICRA burdens on members of federally recognized Indian Tribes. (Pet. 20). In spite of his assertion, the question whether Congress has plenary authority to legislatively "recognize and affirm" inherent Tribal court jurisdiction over members of federally recognized Indian Tribes has long been affirmed. *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903).

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce * * * with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Morton v. Mancari, 417 U.S. 535, 551-552 (1979).

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[1] Gloria Valencia-Webber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 6 U. Pa. J. Const. L. 405, 409-10 (Jan. 2003).

In *Duro v. Reina*, 495 U.S. 676, 692 (1990), this Court stated clearly that Congress has "broad authority" to "impose burdens and benefits" on federally recognized Indian Tribes and their members. Recently the Court found that Congress' plenary power included the "constitutional power to lift restrictions on the tribes' criminal jurisdiction over nonmember Indians." *United States v. Lara*, 541 U.S. 193, 200 (2004), 124 S. Ct. 1628 (2004). Unquestionably, Congress has well-established "plenary and exclusive power" with regard to enacting legislation that singles out federally recognized Indian Tribes and their members, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979), that provide both benefits and burdens.

The Congress, then, must have equal authority and responsibility to clarify relationships between federally recognized Indian Tribes and individuals. *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913) (Congress has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities). Accordingly, the ICRA amendments, in plain language, simply "recognize and affirm" a constitutionally recognized right of the Navajo Nation to enact and enforce its own laws, *United States v. Rogers*, 45 U.S. 567, 573 (1846), and clarifies the relationship between federally recognized Indians and nonmember Indians.

Applying sound federal Indian policy and following this Court's interpretation of Congress' broad constitutional authority over Indian affairs, the Ninth Circuit Court of Appeals correctly found that "it is settled law that, pursuant to the 1990 amendments to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember

Indians for crimes committed on the tribe's reservation." *Means*, 432 F.3d at 931.

II. THE NAVAJO NATION'S CRIMINAL PROSECUTION OF PETITIONER, A NONMEMBER INDIAN, DOES NOT CONFLICT WITH THE NAVAJO TREATY OF 1868

The Petitioner encourages this Court to decide, contrary to well established legal principles,[2] that the Treaty of 1868 prohibits the Navajo Nation from exercising criminal jurisdiction over members of federally recognized Indian Tribes.[3] (Pet. 18-19) The Navajo Nation's understanding is that the authority to regulate activities of non-Navajos within its territorial jurisdiction was retained when it signed the Navajo Treaty of 1868 with the United States.[4]

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[2] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). ("Treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor.")

[3] "If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them. . . ."

[4] "The Navajo Nation, however, argues that a discussion between General Sherman and the Navajo Chief Barboncito during the treaty negotiations expresses an understanding that the Navajo were entitled to 'drive out' raiders from the Ute and Apache tribes who might molest them, and that the Indian 'bad men' clause thereafter meant to confer

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The Navajo Treaty of 1868 strengthens Navajo Nation jurisdiction over individuals and their activities within its territorial jurisdiction. *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969) (Navajo Nation retains exclusive jurisdiction over extradition of members of federally recognized Indian Tribes.) *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 597 (9th Cir. 1983) (Navajo Nation retains civil jurisdiction over non-Indians, saying that "the reservation of land to the Navajos by these treaties establishes Navajo lands as within the exclusive sovereignty of the Tribe under general federal supervision."). See also *Williams v. Lee*, 358 U.S. 217 (1950).

Given the unique political government-to-government relationship and trust responsibilities of the United States to the Navajo Nation, the Ninth Circuit Court of Appeals, while not accepting the Navajo Nation's understanding, reached the correct decision that the plain language within the Navajo Treaty of 1868 and the ICRA can be reconciled to affirm the Navajo Nation's long-held inherent authority to prosecute Petitioner for violating Navajo criminal law.

As the Ninth Circuit Court of Appeals also observed, "The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo, have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do." *Means*, 432 F. 3d at 937.

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jurisdiction over nonmember Indians, not remove it." *Means*, 432 F.3d at 936.

III. LEGISLATION THAT CLARIFIES RELATIONSHIPS BETWEEN INDIVIDUALS AND FEDERALLY RECOGNIZED INDIAN TRIBES DOES NOT VIOLATE EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION

The Petitioner suggests that the Congress has exceeded its authority under the Indian Commerce Clause and has now violated his equal protection rights because Congress has singled out a whole race for purposes of federal legislation. (Pet. 7-10). The legislation actually focuses on the unique political government-to-government relationship between the United States and federally recognized Indian Tribes. As such, the question becomes whether the ICRA amendments, as they impose a burden on members of a federally recognized Indian Tribe, are rationally related, *Mancari*, 417 U.S. at 555, to the "congressional policy of Indian self-government", *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976). The ICRA amendments easily satisfy this requirement.

The United States and the Navajo Nation consecrated their political government-to-government relationship by signing the Navajo Treaty of 1868 more than a century ago. One hundred years later the Court announced that federally recognized Indian Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by **implication** as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) [Emphasis added]. Even though the Court recognized the continued inherent authority of federally recognized Indian Tribes to prosecute their own members, *Id.*, at 326, the Court held in *Oliphant v. Suquamish*, 435 U.S. 191 (1978) that federally recognized Indian Tribes were

implicitly divested of their inherent power to prosecute nonIndians. *Id.* at 206-212 (1978). [Emphasis added]. A mere twelve years later, the Court again **implicitly** divested federally recognized Indian Tribes of inherent governmental authority when it found that federally recognized Indian Tribes no longer had criminal jurisdiction over members of other federally recognized Indian Tribes. *Duro,* 495 U.S. at 684-696 (1990). [Emphasis added].

The result of course was certain, there was no sovereign with recognized authority to prosecute federally recognized nonmember Indians for misdemeanor crimes in Indian Country unless the criminal act fell within applicable federal law. States lacked authority to prosecute members of federally recognized Indian Tribes for their criminal conduct in Indian Country, (Ariz. Const. Art. XX, 36 Stat. 557, § 20; N.M. Const. Art. III, 28 Stat. 107, § 3; Utah Const. Art. XXI, §§ 2, 10, 36 Stat. 557, § 2[5]) See also *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Draper v. United States,* 164 U.S. 240, 242-243 (1896); *United States v. Kagama*, 118 U.S. 375, 384 (1886); *United States v. McBratney*, 104 U.S. 621, 623 (1882). The United States, while it had some authority to prosecute federal crimes in Indian Country, actually lacked jurisdiction over most minor crimes committed in Indian Country by members of federally recognized Indian Tribes. *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994); *Keeble v. U.S.*, 412 U.S. 205, 210-212 (1973); *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883); *United States v. Errol D. Jr.*, 292

[5] Enabling legislation of the States of Arizona, New Mexico, and Utah renouncing jurisdiction in Indian Country as a requirement for admission into the Union.

F.3d 1159, 1161-1162 (9th Cir. Mont. 2002); Indian Country Crimes Act, 18 U.S.C. 1152 (Prohibiting federal prosecution of crimes committed by members of federally recognized Indian Tribe against another member of a federally recognized Indian.); Major Crimes Act, 18 U.S.C. 1153 (Limiting criminal jurisdiction to only fourteen offenses); Assimilative Crimes Act, 18 U.S.C. 13 (Prohibiting federal prosecution of misdemeanor crimes committed by members of federally recognized Indian Tribe against another member of a federally recognized Indian Tribe).

By a simple stroke of a pen, the "smallpox blanket" was suddenly reintroduced into Indian Country. With federally recognized Indian Tribes being **implicitly** divested of its long-held constitutionally recognized inherent authority to prosecute nonmember Indians; the United States having only limited authority and lacking sufficient resources to prosecute misdemeanor crimes in Indian Country; and, the states being prohibited generally from prosecuting these Indians, nonmember Indians were granted clear authority to engage in criminal activities, especially domestic violence,[6] while evading prosecution for their criminal acts.[7] The ability to provide appropriate

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[6] According to statistics reported by the Navajo Nation Judicial Branch, 63,127 new civil and criminal cases were filed in Fiscal Year 2005, including 3,484 civil actions, 11,198 criminal actions, and 5,052 domestic violence cases. Civil and criminal traffic offenses are not included here, nor are offenses involving juveniles. Judicial Branch of the Navajo Nation, Annual Report, Fiscal Year 2005 (October 1, 2004 – September 30, 2005) Released March 2006.

[7] It is not uncommon for the United States Attorney's Office for the District of Arizona, the District of New Mexico, and the District of Utah to decline a case, although working from three separate and distinct federal prosecutorial guidelines, because it does not involve "severe bodily injury or death", or does not involve a significant amount of illegal drugs, or does not involve a significant amount of money. It is

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public safety services was significantly impacted diminishing the quality of life in Indian country.

The Court acknowledged, however, the "ultimate [congressional] authority over Indian affairs" and expressly invited Congress to legislatively remedy the problem. *Duro* at 698. Almost immediately, Congress amended ICRA's definition of Tribes' "powers of self-government" with clear language to include, the inherent power of Indian tribes, "hereby recognized and affirmed, to exercise criminal jurisdiction **over all Indians**." 25 U.S.C. 1301(2). [Emphasis added]. The legislation went on to define "Indian" to mean any person subject to criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. See 25 U.S.C. 1301(4).

A person meets this definition if he is of Indian ancestry and enrolled in or affiliated with a federally recognized Indian Tribe. *United States v. Antelope*, 430 U.S. 641, 646-647, n.7 (1977); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). On the other hand, a person who is only of Indian descent but is not an enrolled member of a federally recognized Indian Tribe is not an "Indian" for purposes of this definition. *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1999); *State v. Sebastian*, 243 Conn. 115, 701 A.2d 13 (1997), *cert. denied*, 118 S. Ct. 856 (1998), *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974).

The Petitioner also attempts to compare the NAACP and its members with members of federally recognized Indian Tribes in an attempt to identify an equal protection argument. (Pet. 14). However, while the NAACP may be a voluntary organization with members and a "political" agenda, it is not a federally recognized government that

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common knowledge that the primary focus of the United States Attorney's Office is homeland security and border patrol.

possesses a political government-to-government relationship with the United States. The definition of "Indian" for determining criminal jurisdiction in Indian Country does not violate equal protection because it is based on a voluntary political affiliation with a federally recognized Indian Tribe, not one based on race as the Petitioner suggests. See *Antelope*, 430 U.S. at 645-650. *United States v. Holiday*, 70 U.S. (3 Wall.) 407, 419 (1866) (the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.). There can be no "Indian" without a federally recognized tribe. See *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979). The reason then for subjecting an individual to criminal jurisdiction in Indian Country is the person must meet the specific requirements for voluntary membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (Federally recognized Indian Tribes have the right to "make their own laws and be ruled by them.")

Consequently, federally recognized Indian Tribes, such as the Navajo Nation, have legislatively created enrollment requirements[8] and established procedures that make

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[8] 1 N.N.C. § 701, "The membership of the Navajo Nation shall consist of the following persons:

A. All persons of Navajo blood whose names appear on the official roll of the Navajo Nation maintained by the Bureau of Indian Affairs.

B. Any person who is at least one-fourth degree Navajo blood, but who has not previously been enrolled as a member of the Navajo Nation, is eligible for membership and enrollment.

C. Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood."

Tribal membership completely voluntary[9], just as an individual's decision to enter into Indian Country and commit a criminal act is completely voluntary. If an individual does not care for the benefits or burdens of voluntary membership in a federally recognized Indian Tribe then that person has the right to relinquish or renounce their membership.[10] See *Duro v. Reina,* 495 U.S. 676, 694 (1990). Equally important, if an individual does not care to be subject to the laws of the Navajo Nation then they have the right not to enter within the territorial jurisdiction of the Navajo Nation, which has clear and defined legal boundaries.

The Petitioner admits that he is an enrolled member of the Oglala Sioux Tribe, a federally recognized tribe. (Pet. 3-4). As a result, it is his political status as a voluntary member of the Oglala Sioux Tribe that subjects him to Navajo Nation jurisdiction not his race. The Navajo Nation does not exercise criminal jurisdiction over individuals simply because they are genetically descendent from the mongoloid race without consent.[11]

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[9] 1 N.N.C. § 751, "Anyone wishing to apply for enrollment in the Navajo Nation may submit an application pursuant to 1 N.N.C. § 760. Such application must be verified before a notary public."

[10] 1 N.N.C. § 705, "Any enrolled member of the Navajo Nation may renounce his membership by written petition to the President of the Navajo Nation requesting that his name be stricken from the Navajo Nation roll. Such person may be reinstated in the Navajo Nation only by the vote of a majority of the Navajo Nation Council." According to records maintained by the Navajo Department of Vital Records, at least 1,417 individuals have voluntarily renounced or relinquished their membership with the Navajo Nation since 1947.

[11] See *Saint Francis College v. Al-Khazraji,* 481 U.S. 604 (1987); *Metrobroadcasting v. FCC,* 497 U.S. 547 (1990) (question reduced to "blood, not background and environment."

If the Petitioner was not a member of a federally recognized Indian Tribe but yet possessed some minor amount of genetic "Indian" heritage he could stand all day long on the top of the highest mountain screaming in his loudest voice that he was in fact an "Indian" without any hope of receiving any "benefit" or "burden" received by the most silent member of a federally recognized Indian Tribe. The act, therefore, of clarifying the relationship between federally recognized Indian Tribes and their members merely clarified the balance of "benefits" and "burdens" members of federally recognized Indian tribes receive in Indian Country. This Court has held that the Congress' broad constitutional authority over Indian affairs includes the ability to promulgate "legislation that might otherwise be offensive." *Yakima Indian Nation*, 439 U.S. at 500-501.

Accordingly, the Court has upheld other legislation that, like the ICRA, has provided both "benefits" and "burdens" to members of federally recognized Indian Tribes. The following are but a few: Removal Act (removing members of federally recognized Indian Tribes from their eastern homelands without their consent), Indian Citizenship Act (granting federal, and state citizenship through the 14th Amendment, to members of federally recognized Indian Tribes without their consent),[12] General Allotment Act (1987) (Distributing land holdings of federally recognized Indian Tribes among its members without their consent), See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Indian Reorganization Act, 25 U.S.C. 461 et seq., (reversed the affects of the General Allotment Act and permitted tribes to design legal structures to aid in self-government), Indian Financing Act of 1974, 24 U.S.C. 1451

[12] *See generally*, Kenneth W. Johnson, Note, *Sovereignty, Citizenship, and the Indian*, 15 Ariz. L.R. 973 (1974).

et seq., (established a revolving loan fund to aid Indian Country development), Indian Self-Determination and Education Assistance Act, 25 U.S.C., 450 et seq., (authorized federally recognized Indian Tribes to assume administrative responsibility for federal Indian programs), Indian Tribal Government Tax Status Act of 1982, 96 Stat. 2607 (according federally recognized Indian Tribes federal tax advantages enjoyed by states), Indian Child Welfare Act, P.L. 95-608, see *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 490 U.S. 30, 104 L. Ed. 2d 79 (1989), *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976) (exclusive Tribal court jurisdiction over child custody proceedings); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976) (tobacco taxes); *Morton v. Mancari*, 417 U.S. 535, 552-554 (1974) (BIA hiring preference); see also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673, n. 20 (1979) (exercise of treaty rights); *United States v. Antelope*, 430 U.S. 642-650 (1977).

IV. THE NAVAJO NATION COURTS PROVIDE INDIVIDUALS WITH PROCEDURAL PROTECTIONS CONSISTENT WITH OR GREATER THAN THOSE REQUIRED BY THE ICRA

Because this Court has determined that the Bill of Rights does not directly apply to federally recognized Indian Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Petitioner makes a broad allegation that he is being unconstitutionally subjected to a nonconstitutional forum that does not provide the "full panoply" of procedural protections required by the United States Constitution. (Pet. 16-18) This is simply incorrect.

The Navajo Nation's territorial jurisdiction includes approximately 27,000 square miles of rural country and

limited infrastructure spanning across the states of Arizona, New Mexico, and Utah. It is one of the largest federally recognized Indian Tribes within the United States with 255,543 enrolled citizens. (Navajo Nation Vital Records Office (2001)) Among the quarter million Navajos, almost 170,000, or close to three-fourths of these citizens live within the territorial jurisdiction of the Navajo Nation. Approximately 12,000 additional residents of the Navajo Nation are nonNavajo and there are hundreds of thousands visitors and guests who travel within the territorial jurisdiction of the Navajo Nation annually. The median population age is 22, with a per capita income of $6,804. In addition, 31.9 percent of tribal housing lacked complete plumbing, 28.1 percent lacked complete kitchen facilities, and 60.1 percent lacked telephone services. (United States Census (2000)) The Navajo Nation's unemployment rate is estimated at 58 percent. (Navajo Nation Economic Development Office). Consequently, all the right ingredients for civil disputes and criminal mischief are present on the Navajo Nation.

To address these issues appropriately, the Navajo Nation has developed a complex civil and criminal justice system that provides parties a fair[13] and neutral forum[14] to

[13] 1 N.N.C. § 3 (1995); "Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation . . . "

[14] "The right to an impartial judge is an essential element of due process and the basic right of a criminal defendant, *McCabe v. Walters*, 5 Nav. R. 43 (1985). The standard for the disqualification of a judge is that there must be facts which show bias and prejudice, which influences the judge so that there may not be a fair trial. Estate of Peshlakai, 3 Nav. R. 180 (Shiprock D. Ct. 1981); *Toledo v. Benally*, 4 Nav. R. 142 (Window Rock D. Ct. 1983)." *Navajo Nation v. MacDonald*, 7 Nav. R. 1, 2 (1992).

resolve civil disputes and prosecute crimes. To ensure that everyone is provided appropriate notice as to what is expected from them as citizens, visitors and guests, the Navajo Nation has enacted and published comprehensive laws that govern individuals and activities within its territorial jurisdiction.[15] To help guide the parties through this complex system, the Navajo Nation has adopted detailed rules and procedures for governing proceedings within its courts, including criminal prosecutions.[16]

The Navajo Nation, as a responsible democratic government,[17] has consciously taken appropriate steps to provide every criminal defendant with broad legal protections pursuant to the Navajo Bill of Rights.[18] These rights are consistent with those provided by state and federal courts and greater than those required by the ICRA.[19] The Navajo Nation Supreme Court has consistently issued decisions strongly defending these rights, especially as it applies to the right of criminal defendants to fair proceedings with appropriate procedural safeguards.

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[15] See Titles 1-24 of the Navajo Nation Code.

[16] The Navajo Nation Rules of Criminal Procedure were adopted by the Navajo Nation Supreme Court on December 29, 1986 and were approved by the Judiciary Committee of the Navajo Nation Council on January 9, 1987 and became effective March 1, 1987.

[17] The sovereign Navajo Nation has the powers to make laws, execute its laws, and interpret its laws. The Navajo Nation Council enacts the laws; the Executive Branch executes those laws; and the Navajo Nation Courts interprets these laws.

[18] 1 N.N.C. §§ 1-9

[19] The Navajo Nation provides appointed counsel to indigent defendants either from the Navajo Nation Public Defender's Office or by requiring pro bono services from members of the Navajo Nation Bar Association, Inc.

Among these rights are the right to a speedy trial[20] and public trial, the right to be informed of the nature of the charges against them, the right against self-incrimination,[21] the right to confront witnesses against them, the right to compulsory process to obtain witnesses on their behalf, the right to counsel,[22] and the right to a

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[20] "Under the Navajo Bill of Rights criminal defendants have a right to a speedy trial. 1 N.N.C. § 6 (2005). In determining whether the right to a speedy trial has been violated, the court applies four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant caused by the delay. *Navajo Nation v. MacDonald*, 7 Nav. R. 1, 11 (Nav. Sup. Ct. 1992); *Navajo Nation v. Bedonie*, 2 Nav. R. 131, 139 (Nav. Ct. App. 1979). The Court interprets these factors in light of Dine' bi beenahaz'a'anii. *Navajo Nation v. Badonie*, No. SC-CV-06-05 slip op. at 4 (Nav. Sup. Ct. March 7, 2006). They are related factors and the Court must consider them together with the relative circumstances, 'engaging in a difficult and sensitive balancing process.' *Id.* Further, 'the right of a speedy trial is necessarily relative,' as 'it is consistent with delays and depends upon circumstances, and secures rights to a defendant, but does not preclude the rights of public justice.' *Id.* at 4-5." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 5.

[21] "We therefore hold that the police, and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. (citations omitted). The sufficiency of the explanation in a Navajo setting means, at a minimum that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence." *Navajo Nation v. Rodriguez*, No. SC-CR-03-04.

[22] "The right to counsel is in the Navajo Bill of Rights including the right to effective assistance of counsel. This right is also guaranteed by the Navajo common law. The traditional Navajo "trial" involved affected individuals "talking" about the offense and the offender to resolve the problem. The alleged offender had the right for someone to speak for

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trial by jury[23] if the offense carries jail-time upon conviction.[24] See also 25 U.S.C. 1302(6) and (10). Unlike the several states that place burdens or restrictions on non-citizen participation in the legal system, the Navajo Nation also allows nonmembers, including non-Indians, the opportunity to help develop Navajo law by serving on juries.[25]

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him. *Boos v. Yazzie*, 6 Nav. R. 211, 214 (1990). The effectiveness of the speaker (and there could be more than one) was measured by what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker was hesitant, was unsure, or failed to move others, that person was not a good speaker and thus was ineffective. This Navajo culture standard is stronger than that required by the Indian Civil Rights Act, just as the Navajo courts have gone beyond that Act by appointing members of the Navajo Nation Bar Association to provide pro bono defense services to indigents. (citations omitted). *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 436 (1991).

[23] *George v. Navajo Tribe*, 2 Nav. R. 1 (1979) (criminal defendants provided prospective Navajo and non-Navajo jurors from Navajo Nation and Arizona's Navajo and Apache counties.)

[24] 1 N.N.C. § 7. Rights of accused; trial by jury; right to counsel: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him or her; and shall have compulsory process for obtaining witnesses in their favor. No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 N.N.C. § 651 shall be denied the right, upon request, to a trial by jury of not less than six persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

[25] 7 N.N.C. § 654. Eligibility of jurors: Any person residing within the territorial jurisdiction of the Navajo Nation over the age of 18 years, of at least ordinary intelligence, and not under judicial restraint, shall be eligible to be a juror. "The requirement that a jury must be a fair

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If an individual claims a violation of due process or equal protection he or she has the right to request judicial review.[26] The Petitioner's case, however, does not raise any

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cross-section of the community comes from the United States Supreme Court ruling in *Glasser v. United States*, 315 U.S. 60 (1942). The rule was applied to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The standards for the rule are found in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and they are as follows: 1) juries must be drawn from a source which is fairly representative of the community, but need not mirror it; 2) all defendants may assert the right, including people who are not members of an excluded group (i.e., Indians can challenge the exclusion of non-Indians from juries); 3) a defendant can prevail by showing a systematic exclusion of distinctive groups of people; but not an occasional mistaken exclusion. The groups which must not be excluded include 'large distinctive groups' and '[i]dentifiable segments playing major roles in the community.' 2 LaFave & Israel, Criminal Procedure § 21.2(d) (1984). Those rules will be applied in Navajo Court." *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 434 (1991) "A jury trial in our Navajo legal system is a modern manifestation of consensus-based resolution our people have used throughout our history to bring people in dispute back into harmony. Jurors are a part of the fundamental principles of participatory democracy, where people came together to resolve issues by "talking things out" *Downy v. Bigman*, 7 Nav. R. 176, 177-178 (Nav. Sup. Ct. 1995). "Through this process community members in disharmony are brought back into a state of hozho. See *Navajo Nation v. Blake*, 7 Nav. R. 233, 234 (Nav. Sup. Ct. 1996) (discussing purpose of dispute resolution as bringing persons back into hozho in the context of resolving criminal matters). The participation of the community in resolving disputes between parties is a deeply-seated part of our collective identity and central to our ways of government. As such, we must apply restrictions on the right to a jury trial narrowly, as they turn us away from our traditional ways of dealing with harmony. Given the importance of juries, we will interpret Section 651 to restrict the right to a jury only when such restrictions are clear. Only if the Navajo Nation Council found it absolutely necessary, and clearly articulated the types of cases it deemed necessary to restrict the right to a jury trial, will we deny the right to a litigant that requests it." *Duncan v. Shiprock District Court*, No. SC-CV-51-04 (October 28, 2004).

[26] "This Court's standard of review in criminal cases focuses upon the essential fairness of the proceedings. The Court will examine any

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procedural issues for review. Aside from his initial pro se motion to dismiss in the Chinle District Court, the Petitioner has been represented by legal counsel. He has yet to be formally prosecuted by the Navajo Nation and it is uncertain he will be because of the significant amount of time that has lapsed since the alleged incident and the alleged victims have since been reported to have changed their minds about the events that occurred and their desire to prosecute the matter.

The Petitioner does not face any excessive fine or a large sentence if convicted.[27] In accordance with Navajo due process[28], the Petitioner continues to be released from custody on his own recognizance[29] and he does not allege

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error, whether or not it is raised by a defendant, which is plain and affects substantial rights, or if review is necessary to avoid grave injustice." *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 433 (Navajo 1991) (citing *Navajo Nation v. Platero*, 6 Nav. R. 422, 428 (1991)

[27] At the time of the Petitioner's arrest, the Navajo Nation had not adopted the 1986 ICRA amendments authorizing tribes to increase their penalties from a $500 fine or no greater than six months imprisonment or both to a $5000 fine or no greater than one-year imprisonment or both. As a result, the Petitioner will be facing the lesser sentencing provisions.

[28] The Navajo principle of k'e is important to understanding Navajo due process. K'e contemplates one's unique, reciprocal relationship to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in hozho, or harmony, k'e stresses the duties and obligations of individuals relative to their community. (Footnote omitted). The importance of k'e to maintaining social order cannot be overstated. In light of k'e, due process can be understood as a means to ensure that individuals who are living in a state of disorder or harmony, are brought back into the community so that order for the entire community can be reestablished." *Atcitty and Begay v. W.R. Dist. Ct.*, 7 Nav. R. 227, 230, (1996).

[29] It should be noted that recently the Petitioner found gainful employment within the Navajo Nation. As an actor, he played a major role portraying a Navajo boxing coach in the motion picture, "Black

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any specific procedural defects in his prosecution. More importantly, he has been provided numerous opportunities to present his position at various levels and before various tribunals through habeas corpus proceedings. And should Petitioner by convicted[30] and sentenced; he once again has the right to seek habeas corpus review of the detention, if any[31]. 25 U.S.C. 1303.

While this Court in *Lara*, expressed concerns about a defendant's rights being protected in tribal courts, *Id.* at 207, the Ninth Circuit Court of Appeals found that "as a

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Cloud", that was filmed primarily within the territorial jurisdiction of the Navajo Nation.

[30] "The Navajo Nation must prove each element of each statutory violation charged beyond a reasonable doubt. The defendant's innocence is presumed. 17 N.T.C. § 206, *Platero*, Nav. R. 422, 429." *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 442 (1991).

[31] "A habeas corpus proceeding allows this Court to review whether a person is being illegally detained. If, based on the allegations in the defendant's petition, the Chief Justice believes there is a reasonable likelihood of illegal detention, the Chief Justice issues the writ to have the defendant produced to the Court. See *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 4 (Nav. Sup. Ct. May 24, 2004) (Detention is illegal if the court that ordered the detention violated that person's rights under the Navajo Bill of Rights. See e.g., *id.* slip op. at 8, (violation of right against cruel and unusual punishment); *Martine v. Antone*, no. SC-CV-48-02, slip op. at 3 (Nav. Sup. Ct. August 13, 2003) (same); *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 6-7 (Nav. Sup. Ct. May 4, 2001) (violation of right to liberty). The writ simply orders the person holding the defendant to appear before the Court, as the Court may not release the defendant without a hearing before three justices. See *Thompson*, No. SC-CV-29-04, slip op. at 4; Navajo Rules of Appellate Procedure, Rule 14(d) (footnote omitted). At the hearing, the respondent . . . must justify the detention, Thompson, slip op. at 4. If the detention is not justified, the remedy is the defendant's release from the illegal detention. In re H.M., No. SC-CV-63-04, slip op. at 6 (Nav. Sup. Ct. October 13, 2004)." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 2-3 (Nav. Sup. Ct. March 28, 2006).

facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution." *Means*, 432 F.3d at 935. The Navajo Nation, therefore, is providing "the full panoply" of procedural protections to the Petitioner in a manner consistent with those provided by state and federal courts and greater than those required by the ICRA.

CLOSING

As George Catlin, an 18th Century attorney and famous early American painter of "North American Indians", wrote, "Amongst the numerous historians, however, of these [Indians] they have had some friends who have done them justice; yet as a part of all systems of justice, whenever it is meted to the poor Indians, it comes invariably too late, or is administered at an insufficient distance; and that too when his enemies are continually about him, and effectually applying the means of his destruction."[32] These words continue to hold true.

As it stands, "Criminal jurisdiction over offenses committed in Indian Country is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (citations omitted); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Which of these sovereigns have the authority to prosecute a criminal act in Indian Country largely depends on the nature of the offense, the existence of applicable law, and whether the victim or the alleged

[32] Letter from George Catlin, in 1 *Letters and Notes on the North American Indian* 8 (JG Press 1995).

perpetrator is a member of a federally recognized Indian tribe.

With the passage of ICRA, as amended, the Congress properly exercised its broad constitutional authority to respond to the health, safety and welfare of all citizens, visitors and guests within Indian Country while providing members of federally recognized Indian Tribes adequate procedural protections. The Ninth Circuit Court of Appeals correctly affirmed the Navajo Nation's inherent authority to prosecute the Petitioner, a member of a federally recognized Indian Tribe, applying well-reasoned precedent interpreting the Congress' broad constitutional authority over Indian affairs and considering the procedural protections provided by the Navajo Nation to criminal defendants.

Should this Court determine that the Navajo Nation cannot prosecute nonmember Indians, then much like the smallpox infected blankets that once spread disease and destruction throughout Indian Country, the health, welfare and safety of citizens, visitors and guests of Indian Country would be in great jeopardy. An adverse ruling would once again greatly diminish the quality of life and opportunity for social, economic, and political development in Indian Country and leave in its place uncoordinated, ineffective and inefficient public safety services. Correspondingly, it would foster greater opportunity for crime and chaos with little or no ability to respond, especially for acts of domestic violence.

Sons and daughters from almost every federally recognized Indian tribe throughout Indian Country proudly serve in every branch of the United States military and unselfishly give their lives on foreign soil fighting

for the right of others to defend themselves from oppression.[33] They should not be required to return to sleep in the midst of "smallpox blankets" as the inherent rights of Indian Nations are slowly eroded through the legal fiction of "implicit divestiture."

"By re-shaping the definition of tribal sovereignty, the Court has struck at the heart of governmental independence for tribes at a time when economies are at their strongest. . . . Thus, as the tribes become active players in the political arena and increasingly able to assert jurisdictional powers, the Court weakened their political bargaining position by undercutting their jurisdictional authority."[34] As one writer has noted, "As broad as the extension of Congressional power over Indian affairs was intended to

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[33] "By 1880, only 250,000 Indians remained and this gave rise to the "Vanishing American" theory. By 1940, this population had risen to about 350,000. During World War II more than 44,000 Native Americans saw military service. They served on all fronts in the conflict and were honored by receiving numerous Purple Hearts, Air Medals, Distinguished Flying Crosses, Bronze Stars, Silver Stars, Distinguished Service Crosses, and three Congressional Medals of Honor. * * * As the 20th century comes to a close, there are nearly 190,000 Native American military veterans. It is well recognized that historically, Native Americans have the highest record of service per capita when compared to other ethnic groups." American Indians in World War II, http://www.defenselink.mil/specials/nativeamerican01/wwii.html. The Department of Navajo Veterans Affairs reports that there are presently 11,621 Navajo veterans officially recorded who have served honorably in the United States military of which 8,175 are still alive. (Department of Navajo Veterans Affairs)

[34] E. Andrew Long, Article, The New Frontier of Federal Law: The United States Supreme Court's Active Divestiture of Tribal Sovereignty, 23 Bluff. Pub. Int. L.R. 1, 48 (2005)

be, it was not the purpose of the government, in claiming or exercising that power, to destroy tribal sovereignty."[35]

CONCLUSION

The Navajo Nation is a responsible democratic government. While it may pre-date the Constitution and not be bound by its Bill of Rights, and while there may be procedural errors from time to time within its judicial system, the Navajo Nation provides all individuals with an opportunity to present their claim before a fair and impartial court with appropriate procedural safeguards and in a manner consistent with its state and federal counterparts, including review by habeas corpus. If necessary, it is time for the Court to distinguish the Navajo Nation from other Indian Nations. The Petition for writ of certiorari should be denied.

Respectfully Submitted,

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[35] David Getches, *Beyond the Law: The Renquist's Court's Pursuit of State's Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L.R. 267, 271 (Dec. 2001)